FIRST SESSION—TWENTY-SECOND PARLIAMENT
1953-54

Joint Committee of the Senate and the House of Commons

ON

CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES

Joint Chairmen:—The Honourable Senator Salter A. Hayden
and
Mr. Don F. Brown, M.P.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 4

TUESDAY, MARCH 16, 1954

WITNESS:

Mr. Arthur Maloney, Q.C., Chairman of Committee on Criminal Justice, Ontario Branch of the Canadian Bar Association.

APPENDIX A:

Bibliography of Books, etc., available in the Library of Parliament respecting Capital and Corporal Punishment and Lotteries.

APPENDIX B:

Brief on abolition of Capital Punishment of the Canadian Friends' Service Committee of the Religious Society of Friends (Quakers) in Canada.

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1954

COMMITTEE MEMBERSHIP

For the Senate (10)

Hon. Walter M. Aseltine
Hon. Elie Beauregard
Hon. Paul Henri Bouffard
Hon. John W. de B. Farris
Hon. Muriel McQueen Fergusson
Hon. Salter A. Hayden (*Joint Chairman*)
Hon. Nancy Hodges
Hon. John A. McDonald
Hon. Arthur W. Roebuck
Hon. Clarence Joseph Veniot

For the House of Commons (17)

Miss Sybil Bennett
Mr. Maurice Boisvert
Mr. J. E. Brown
Mr. Don. F. Brown (*Joint Chairman*)
Mr. A. J. P. Cameron
Mr. Hector Dupuis
Mr. F. T. Fairey
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Hon. Stuart S. Garson
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Mr. R. W. Mitchell
Mr. H. J. Murphy
Mr. F. D. Shaw
Mrs. Ann Shipley
Mr. Ross Thatcher
Mr. Phillippe Valois
Mr. H. E. Winch

A. Small,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

MORNING SITTING

TUESDAY, March 16, 1954.

The Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries met at 11.00 a.m. The Joint Chairman, the Honourable Senator Hayden, presided.

Present:

The Senate: The Honourable Senators Bouffard, Hayden, Hodges, McDonald, and Veniot—(5).

The House of Commons: Messrs. Boisvert, Brown (*Brantford*), Brown (*Essex West*), Cameron (*High Park*), Dupuis, Fairey, Carson, Lusby, Shaw, Thatcher, Valois, and Winch—(12).

In attendance: Mr. Arthur Maloney, Q.C., Chairman of Committee on Criminal Justice, Ontario Branch of the Canadian Bar Association.

On motion of the Honourable Senator Hodges,

Ordered,—That the bibliography of books on capital and corporal punishment and lotteries provided by the Parliamentary Library be printed as an appendix to this day's Minutes of Proceedings and Evidence. (*See Appendix A*).

Mr. Maloney was called, made his presentation to the Committee on abolition of capital punishment, and was being questioned thereon.

At 1.05 p.m., the Committee interrupted its proceedings.

AFTERNOON SITTING

At 3.00 p.m., the Committee resumed and completed its questioning of Mr. Maloney in respect of his presentation on abolition of capital punishment.

The Committee expressed its appreciation to Mr. Maloney for his presentation to the Committee.

The witness retired.

During the course of Mr. Maloney's presentation, reference was made to the following material:

1. *Annals of the American Academy of Political and Social Science,* "Murder and the Death Penalty", November 1952 issue;
2. "The Shadow of the Gallows" by Viscount Templewood; and
3. "Convicting the Innocent" by Prof. Borchard of Yale University.

Agreed,—That a recommendation be made to the Parliamentary Library suggesting that any of the foregoing references not presently available be acquired.

At 4.15 p.m., the Committee adjourned to meet again at 4.00 p.m., Thursday, March 18, 1954.

A. SMALL,
Clerk of the Committee

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EVIDENCE

MARCH 16, 1954
11.00 a.m.

The PRESIDING CHAIRMAN: I think we can call it 11 o'clock, and we have a quorum. There are a few items that we would like to get out of the way. A motion is required to print the bibliography of books on capital punishment, corporal punishment and lotteries from the parliamentary library as an appendix to the Minutes of Proceedings and Evidence.

Moved by Senator McDonald.
Carried.

I direct your attention to the fact that the next meeting will be on Thursday at 4 o'clock and Mr. Leslie E. Wismer, Director of Public Relations and Research, Trades and Labor Congress of Canada, will be the witness, and I think the subject will be lotteries.

We have today Mr. Arthur Maloney, Q.C., of Toronto, Chairman of the Committee on Criminal Justice of the Ontario Branch of the Canadian Bar Association. To those of us who live in the province of Ontario, Mr. Maloney is well known, and he has had quite a broad experience in the field of criminal law.

Mr. Arthur Maloney, Q.C., Chairman of the Committee on Criminal Justice, Ontario Branch of the Canadian Bar Association, called:

The PRESIDING CHAIRMAN: The same arrangement will follow, that is that we will hear the statement from the witness first and then go into the matter of questions afterwards.

The WITNESS: Mr. Chairman and members of the committee, I must say I am grateful for the honour of the invitation to appear before you, and I approach my assignment with all humility. It is only fair that I should briefly tell you about what experience I have had with the subject so that you can determine for yourselves what value, if any, you may derive out of what I will say. In my 11 years at the bar of Ontario, I have had occasion to act as counsel, either at trial or on appeal, in 11 capital cases. I have been associated in a professional capacity with five prisoners who were under sentence of death, four of whom were in fact executed, and in the case of these four my meetings and my interviews with them included that period of their existence when all hope was lost, in that, even executive clemency had at that stage been denied. Let me say that the impression I derived from the four cases to which I have just referred was this—and it was common to them all—none of them was insusceptible to reformative influence. All of them were safe risks for ultimate release back into the society whose laws they had been convicted of violating. I was satisfied personally, on the basis of my association with them and with their cases, of the futility of what was to be done to them. I was sure it would accomplish no useful purpose for them or for society, and I had the disquieting feeling that the whole sordid performance that was about to occur in respect to their cases was incompatible with any normal conception of what a civilized society is or ought to be.

Now, with that general prefatory observation, let me tell you briefly of the plan that I propose to follow. The subject under discussion is one which can be considered in many aspects and under many headings. I have made as careful a study as I could make of the subject by reference to the many texts that are available to people who are interested in it, but these texts are equally available to you. For example, the report of the recent royal commission in England contains in a convenient way all the statistics and statistical data with which any committee of this nature could wish to be furnished, and for me to try to review statistics applicable to other jurisdictions for your benefit would simply be to repeat what you really have an opportunity of studying for yourselves from other sources. What I had, then, intended to do instead was to deal with the subject this morning in a limited way and to try to bring to bear upon my treatment of it some personal experiences which may be of assistance to you, and of more assistance than I would be were I to follow any other course.

I would commend to the attention of the committee and to all of its members, Mr. Chairman, two publications which may or may not presently be part of your bibliography. The first publication is the Annals, and the date of the edition of the Annals is November, 1952. The subject matter of that particular edition is entitled, "Murder and the Penalty of Death".

Mr. BROWN *(Essex West)*: I have a copy here.

The WITNESS: Thank you, Mr. Brown. I have a copy. The second publication which I respectfully suggest that you would derive much benefit from reading is a book entitled, "The Shadow of the Gallows", the author of which is Viscount Templewood, formerly Sir Samuel Hoare. It was edited first in 1952 in England. In reading those books, if you leave them with the same impression as I did, it will be this: that the death penalty is not the only effective deterrent, that there is no relationship between the number of homicides on the one hand and the presence or absence of the death penalty on the other, that the murder rate in any jurisdiction is related to many different factors which in their nature are cultural, geographical, racial and sociological.

You will, in the course of your deliberations, hear arguments put forward by those who favour the retention of capital punishment to the effect that, because of the many safeguards our criminal procedure in Canada involves, it is inconceivable that any but the most deserving cases are put to death. Now, it is with those alleged safeguards that I should like briefly to deal this morning. I was struck, as I read the debates in New Zealand and as I read the debates in the British House of Commons, with the frequency with which that argument was put forward, the argument that says that none but the worst will be hanged because of the safeguards our machinery provides. Now, these are the safeguards that they mention, and they are all part and parcel of our criminal procedure which has been outlined to you in previous meetings by other speakers. I speak to you about them this morning from the point of view of a defence counsel who has had a close connection with every one of them.

The first safeguard relied upon is the preliminary inquiry that takes place shortly after, or as soon after as is practicable, the arrest of a person accused of murder. What is a preliminary hearing? It is an inquiry held before a magistrate, the object of which is to determine whether there is enough evidence to warrant the accused person being sent on for trial. The test that the magistrate under our law must apply is this—"If all the evidence heard by me, uncontradicted and unexplained, were heard by a jury and accepted by them, would such a jury probably convict the accused person?" If the magistrate's answer to that question is "Yes", it is his duty to commit for trial. If it is "No", it is his duty to discharge the accused person from custody. You

will be told that at that stage Crown counsel introduces into the record of the case all of the evidence that he then has in his possession against the accused and that that thereby puts the accused person in an advantageous position in that he knows, long before the trial, the complete substance of the case that he is ultimately going to be called upon to meet. Now, that would be a convenient state of affairs, but in the experience of those who are engaged in the practice of criminal law while that may be so in theory, it is not so in practice, because the tendency among Crown officials undoubtedly is to adduce at that stage of a prosecution only so much evidence as will be sufficient to enable the magistrate to determine whether or not the accused should be committed for trial. I give you a specific example of what I mean. In the fall of 1952, I acted in the defence of an accused murderer, Leonard Jackson. At the time of his preliminary hearing he was not represented by counsel. At the preliminary hearing three or four witnesses were called by the Crown, whose evidence was sufficient to enable the magistrate to send the case on for trial. At the trial several weeks later an indictment was prepared and considered by the grand jury, which contained the names of more than 40 witnesses. I had not the remotest idea of what 90 per cent of those witnesses were going to say. I was called into the trial about five days before the trial commenced. I sought to obtain a summary of what these witnesses were to say, and of what the effect of their evidence would be; I was denied that. I made efforts to see if it were possible to interview the witnesses myself. It was impossible to do that, because I was not furnished in any way with their addresses, and the main witness whom I did seek to interview refused to speak to me about the case. Now, that to me demonstrates that a preliminary inquiry is not the safeguard that you may be told it is.

The second safeguard relied upon is the grand jury, which we still retain in the province of Ontario. What is the function of the grand jury? In effect it is to review the conclusion already arrived at by the magistrate. How does it carry on its deliberations? It is composed of 13 persons who hear the testimony of some of the witnesses who will ultimately be called to give evidence at the trial. The accused man is not present at their deliberations, nor is his counsel, and their proceedings are held in camera and are held in the presence of Crown counsel, and there is no doubt that the grand jury in our province relies almost implicitly on the guidance he chooses to give them. Now, such a step in our machinery, in my opinion, does not represent a very valuable safeguard to an accused person.

You will then be told that at the trial of an accused person before his jury is chosen he can challenge a number of jurymen. You will be told that he can challenge any number of jurymen for cause, these causes being that the juryman's name was not on the panel, that he was not indifferent as between our Lady the Queen and the accused, that he was an alien, or that he was convicted under certain circumstances of an offence himself. That sounds like a safeguard of some importance. The actual fact is that the average defence counsel knows absolutely nothing about the background of the jurymen on the panel, so while it is a right in theory, it is not much of a right in practice, and it is a right that is only very rarely exercised, due to the ignorance of counsel of the facts that he would have to establish in order to challenge a juryman for cause. You will then be told that, in addition to these challenges which can be made without limit, there are in capital cases what are known as 20 peremptory challenges. Now, Mr. Chairman and members of the committee, it is important that you should know on what basis defence counsel exercises the right to challenge peremptorily a jury. In the vast majority of cases, as I have already indicated, we have no knowledge of the background of the individual jurymen, and the only basis we have on which to determine whether or not he should be challenged is

the impression such a juryman makes upon us as he is called from the body of the courtroom and walks to the front of the courtroom. That is one basis on which we try to judge whether or not he would be a satisfactory juryman. His appearance and occupation are other factors. Otherwise with uncommon exceptions we know nothing about him. Now, for those reasons I fail to see how the right to challenge twenty jurors peremptorily furnishes any very important safeguard to an accused person.

You will then be told that Crown counsel is an instrument in the machinery of justice that represents a safeguard to an accused person. The traditional concept of counsel for the Crown in any criminal prosecution is this: that he is a minister of justice indifferent to the outcome of the case, unconcerned about what the jury's verdict will be, and charged with a duty to see to it that all of the evidence, both for and against the prisoner, is brought out for the consideration of the jury. Now, the traditional conception of the Crown counsel is a lofty one, but the actual fact is that in practice that is not so. There is a tendency in recent years on the part of prosecuting officers to view a criminal prosecution as a contest between two opposing parties. Mind you, Crown counsel depend for their information in the individual case on police officers who are connected with the investigation of the case.

You will then be told that the trial judge is a further instrument in our machinery whereby trials of an accused person are safeguarded. The role of a trial judge is to preside at a criminal trial and to conduct the course of the trial as it proceeds before him.

Now, in regard to trial judges, they are human beings. Judges differ in outlook, personality and temperament, as do other men in any other occupation of life. A judge wields tremendous weight at the trial and his views have a powerful influence over a jury. Such views vary with the outlook, temperament, and personality of the individual trial judge. This leads to an inequality in the administration of justice in cases where the death penalty has been carried out, because there can be no doubt that an offender's chances of being acquitted of murder are greater if his trial is presided over by one judge rather than by another.

Then you will be told about the role of counsel for the defence, and you may be left with the impression that no person convicted of murder has been convicted without having had his defence put forward by competent legal counsel. In practice, Mr. Chairman and members of the committee, the large majority of convicted murderers in our country are in impoverished circumstances and are more often than not defended by younger counsel lacking in experience for whom such a trial is a completely novel experiment. Persons of means who are charged with this offence can retain the services of most celebrated and highly priced counsel and their chances of avoiding the death penalty are for that reason much greater. Now, this inequality is implicit in any society and will never be removed, but its disastrous effects would be removed if the death penalty were abolished. I have in mind the case of a particular defence counsel about whose case I naturally speak with sympathy and with some reluctance. I will not divulge his name to the committee, nor will I divulge the names of the persons whom he represented at trial, except that I will give the chairman a written memorandum of these particulars if a further investigation of what I say is thought to be desirable. I know in Ontario, personally, of four cases of persons accused of murder who were defended by a counsel who was completely lacking in experience and who was seriously believed to be suffering himself from a mental disorder. Our suspicions in regard to that state of affairs were subsequently confirmed when he was placed in a mental institution where I am informed he is still detained.

In three of these cases he sought them out. Briefly, in regard to the history of the four cases I should say this: they were all convicted of murder; three of them were executed; one of them had the good fortune to have his sentence commuted to imprisonment for life. In the case of the three who were executed, one of the cases in my opinion was one in which a different result might have been produced had the accused person been defended by an experienced well-trained criminal counsel. I put it on no higher basis than that. In the other two cases of the executed offenders, it is my opinion that no counsel, no matter what his talents, could have brought about a different result.

You will then be told that a further safeguard is a right of appeal to the provincial court of appeal. Where errors in the law are shown to have occurred at the trial, a provincial appellate court is in the fortunate position where it can avert or prevent a miscarriage of justice. But, where there is evidence to support the verdict and where the jury have apparently seen fit to act on such evidence, an appellate court will not interefere. The court of appeal prevents a number of miscarriages of justice. But, consider the case of the offender who has been convicted of murder on the perjured testimony of a plausible witness; an appellate court will furnish no safeguard for him.

The next safeguard mentioned is the right of appeal to the Supreme Court of Canada. The jurisdiction of the Supreme Court of Canada is limited indeed. In the first place, a right of appeal to that court only exists if a dissenting judgment has been rendered in the provincial appellate court, and such dissenting judgment must relate to a question of law. The only right of appeal that otherwise exists is where leave to appeal has been granted by a single judge of that court, and such leave will not be granted unless a question of law is shown to be involved, and it is not any question of law which would justify the granting of leave to appeal, but a question of law of importance. Because of its limited jurisdiction it is not frequent for the Supreme Court of Canada to find itself in a position where it can rectify errors in justice.

I would be remiss in my duties at this stage if I were to fail to point out that it is the experience of defence counsel in Ontario where appeal procedure has been resorted to in capital cases to find the department of the Attorney General to be exceedingly fair and generous. Invariably the cost of the transcript of evidence that is needed for the argument of the appeal is furnished by that department, and more often than not where it is sought to make application for leave to appeal to the Supreme Court of Canada in Ottawa the expenses involved by counsel in going to Ottawa are paid for by that department.

The final safeguard that is relied upon is the safeguard involved in the prerogative of mercy, more commonly known as executive clemency. I have, in my personal experience, sought to obtain executive clemency for eight convicted murderers. I have succeeded in obtaining executive clemency for two of those convicted murderers. It has been my personal experience that executive clemency is extremely difficult to obtain, and I base that opinion on the eight cases to which I have referred. So far as I am aware this committee has not yet heard the policy that is applied by the Department of Justice in determining whether or not executive clemency should be granted. I have no doubt that such information will ultimately be given to you.

Then, coming next to the machinery of the department, some of its objectionable features in my opinion are these: the department tends too frequently to refuse clemency in cases where all appeals have been denied, seeming to assume that the jury having found as it did, the appellate courts having found as they did, it would not be right to interfere. In my submission, this ignores the duty of the department to apply totally different considerations to those that are applied by the jury and by the appellate courts. A further objection is that too much attention is paid to the opinion of the individual trial judge.

Now, such an opinion is entitled to respect. But I ask you to examine by what right is such an opinion given? A trial judge knows no more, or ought to know no more, about the background of the individual case or offender than the transcript of the evidence adduced before him discloses. He has had no opportunity to confer with the prisoner, to talk to him, except insofar as he has had an opportunity to hear the individual prisoner as he testified in his own defence before him. The opinion of a trial judge carries great weight, and in my opinion for the reasons I have stated, it is not deserving of all the weight it is given.

In respect to a jury's recommendation of leniency, my understanding is that more often than not such a recommendation is respected. It is not always respected however. What has often worried me is this: is any inference drawn by the Department of Justice in considering whether clemency should or should not be granted by the failure of a jury to make such a recommendation? I do not know. If any unfavourable inference is drawn from the failure to make such a recommendation, I think it is unfortunate because our juries in Ontario —and I believe this to be so throughout the country—are not told, and indeed may not be told, of their right to bring in such a recommendation. The reason they are not told before rendering their verdict is the fear that is entertained that it may cause them to compromise their verdict, or the verdict that they ultimately render. But there are undoubtedly juries who would recommend clemency if only aware of their right to do so.

And finally, in regard to executive clemency, it is my respectful submission, Mr. Chairman and members of the committee, that adequate use is not made of the prerogative of mercy. I have in mind two cases in which I submit clemency should have been granted but in which it was refused. I will give my opinions for saying so—you may or may not agree with my conclusions. I have in mind, first of all, the case of Harry Lee, executed in 1953 in Hamilton for murder. I submit he should have been given executive clemency because one outstanding psychiatrist who examined him at the request of the defence had expressed doubts about Harry Lee's sanity. The other psychiatrist who examined him at the expense or invitation of the Crown came to another conclusion, but the fact remains that one outstanding psychiatrist, an expert in his field, expressed the considered opinion that there was some doubt about Harry Lee's sanity. My submission is where that state of affairs exists executive clemency should be granted as a matter of course.

The second case in which executive clemency was refused, where in my submission it should have been granted, was the recent case of one Hudson, executed in North Bay. The facts in the case of Hudson are particularly shocking. They involve the brutal murder of a little child upon whom a horrible assault had been perpetrated.

Normally these facts would seem to warrant the execution of the prisoner in the present state of our law. The fact is that an outstanding psychiatrist expressed the opinion that the offender was an epileptic. On the day in question Hudson was intoxicated and the psychiatrist I have mentioned was of the opinion that at least there was good reason to doubt whether or not at the time of the attack the offender was in an epileptic condition. In my submission there was sufficient doubt in the case of this accused not only to justify but, respectfully, to demand executive clemency. Now, Mr. Chairman and members of the committee, those are the safeguards which are frequently relied upon. Those are the answers that I make to them.

I wish this morning only briefly to deal with one further aspect of this subject, namely the possibility of a miscarriage of justice. That is, are people executed who ought not to be, because they are completely innocent, or, if not completely innocent, innocent of the full offense of murder?

Miscarriages of justice occur in two fields—they occur in the field of law and they occur in the field of fact. Let me deal with errors in the field of law. By that, I simply mean that in various cases it may be that our law is not being correctly interpreted. I will illustrate that submission by two practical examples.

The first example is the celebrated case of the King versus Woolmington in 1935 in England. Woolmington had been convicted of murder. His defence to the charge of murder was accident. The trial judge had instructed the jury, conforming to a belief that had prevailed since 1762, that where an accused person charged with murder raises a defence of accident the onus in law is on him to prove such defence. The House of Lords then had occasion to hear the appeal of the accused. That tribunal held that in any criminal proceeding the onus was on the Crown throughout, and that the law which the jury had been instructed to apply was not, and never had been, the law of England. How many people were executed in England between 1762 and 1935 for failing to satisfy an onus that never existed? No one will ever know.

Coming closer to home, let us consider the celebrated case of Rex versus Hughes in 1942 in British Columbia. In that case, the Supreme Court of Canada held that in certain circumstances where death was caused accidentally, even in the course of the commission of a serious offence such as robbery, it was open to a jury to convict of manslaughter. That had not been, up until that time, regarded as the law of Canada. In the case of Hughes, there was some evidence that at the time of the robbery and at the time of the infliction of the fatal wound his gun had been fired accidentally. The jury had been instructed by the trial judge, conforming again to the belief which was common at that time and had been for years before, that since death was caused in the course of the commission of a robbery, accident was not a defence. On appeal to the Supreme Court of Canada the law was found to be otherwise. We do not know how many persons from the time of Confederation to 1942 were executed because of the fact that juries were instructed in accordance with the manner used in the case of Hughes. In the case of this offender, on the occasion of his new trial, he was acquitted of murder and convicted of manslaughter. The law in that regard was subsequently changed about 5 or 6 years later by statute, the effect of such statutory amendment being to revert back to the theory or concept of the law which was entertained before 1942.

A further practical demonstration of a case where an error in law may have produced a miscarriage of justice, is the celebrated case of Rex and Taylor in Canada. In that case at trial the accused Taylor, charged with murder, relied upon certain words as being the provocation that caused him to commit the crime and that had the effect of reducing it from murder to manslaughter. The trial judge instructed the jury to the effect that words, under our law, did not constitute provocation. On appeal to the Supreme Court of Canada it was held that our law in that respect differed from the common law of England and that words may in a proper case constitute sufficient provocation to warrant the reduction of a charge from murder to manslaughter.

Those are all the examples with which I will trouble you. That, in my submission, helps to demonstrate that miscarriages of justice may occur and have occurred in the field of law.

I am not going to try to deal in any detail with errors in fact or in the field of fact other than to recommend that you examine the very interesting book entitled "Convicting the Innocent", written by Professor Borchard of Yale University.

Mr. DUPUIS: Will you please spell the name?

The WITNESS: Borchard, B o r c h a r d.

Mr. DUPUIS: Of what?

The WITNESS: Of Yale University. And the title of the book is "Convicting the Innocent". In that book are collected 65 cases, the majority of them being American cases in which it had been established that persons innocent of such crimes had been convicted; and I recall that 25 of such cases were murder cases.

I would bore you if I tried to refer at any length to the case of Adolph Beck in England and to the case of Oscar Slater; but if you read "The Annals" and "The Shadow of the Gallows" you will see those cases fully referred to.

In regard to this part of my submission let me simply refer you to two cases not involving murder, in the city of Toronto; the case of Paul Cachia who had been tried and convicted of the crime of robbery upon two occasions. On the third trial, or rather upon the occasion of the third trial he was acquitted when a witness who had not testified at the earlier trials delivered testimony that established Cachia's innocence. The trial judge on the occasion of the third trial expressed the view that he was satisfied that Cachia was innocent. Cachia is indebted to the Minister of Justice who exercised his prerogative under Section 1022 of the Criminal Code, in ordering the second trial in the case of this accused man.

But what worries me about the case of Cachia is this: that if the victim of the robbery had been slain at the time of its commission, Cachia, an innocent person, would have been executed.

A further case of innocence that was convicted was that of Ronald Powers who after 10 months of imprisonment was released in 1952, having been convicted of robbery where his innocence was subsequently proven. It will be said that all these were not capital cases and that such an error could not occur where the death penalty was to be carried out. But, with respect, I see no merit in that argument. If errors of that nature can occur in cases where it is not a capital offence, it is equally probable that they will occur in the capital field, and I do not believe that there are statistics anywhere available in Canada to establish that any innocent person has been convicted of murder and executed.

My concluding submission to the committee is that the death penalty should be abolished in Canada and that, if not abolished, effect should be given in this country to the recommendations made to the House of Commons in England by the Royal Commission appointed to investigate the question over there. That, Mr. Chairman, concludes my submission.

The PRESIDING CHAIRMAN: Thank you. Now, gentlemen, I am sure you must have some questions and we shall start this morning in the reverse order, with Senator Veniot. Senator Veniot, have you any questions to ask the witness?

Hon. Mr. VENIOT: No, Mr. Chairman.

The PRESIDING CHAIRMAN: Now, Mr. Shaw?

Mr. SHAW: I have just arrived, Mr. Chairman.

The PRESIDING CHAIRMAN: Now, Mr. Boisvert.

By Mr. Boisvert:

Q. Mr. Chairman, I would like to ask the witness a few questions. Do you think that Crown Prosecutors today are impartial in conducting a case against someone who is accused of murder?—A. That question cannot be answered yes or no, Mr. Boisvert. All I can say is that it has been my experience in a number of cases that crown counsel did not in fact practice the traditional concept which we entertain of them. I know, and I am

personally acquainted with, many crown counsel in Ontario. They are men of exceptional honesty and integrity and often of great ability. But it is not my opinion that they conduct prosecutions in accordance with the traditional concept of their office. If that means they are not impartial, then the answer to your question would have to be accordingly.

Q. Yes.

Mr. BROWN (*Essex West*): They are only human beings like the rest of us.

The WITNESS: My view is that in many cases crown counsel feel that a verdict of guilty is a victory for the Crown, and that a verdict of not guilty means defeat for the Crown.

By Mr. Boisvert:

Q. Is it not the duty of the Crown prosecutor to permit any accused person to have a full defence at all times?—A. That clearly is his duty. He is not to do anything to prevent it, he is not to do anything which would make it difficult.

Q. Is it not the general practice in Ontario according to your gifted knowledge of criminal law that Crown prosecutors try to help the defence to the fullest extent?—A. That is not my impression in all cases.

Q. Well, an "impression" is quite different from a question of fact. We may sometimes have an impression which could be a bad impression, because we are only human beings who appear in the courts of justice.—A. That is not my experience, then, in fact. In some of the cases in which I have appeared where the individual Crown counsel is of the view that there should not be a conviction, he will facilitate the conduct of the defence in a way which he might not otherwise do. For him to confine his assistance to such cases means that, in my submission, he is usurping the function of the judge or jury.

Q. I would like to ask two more questions: you give in detail all the safeguards that the criminal should get from the practice of law and from the code of procedure and our way of practising law before the trial courts. But I would like you to comment on what safeguards there are for innocent people against conviction of murder and brutal killing.—A. I am sorry, Mr. Boisvert, but I am not sure that I understood your question.

Q. My question is this: According to the Criminal Code there are a lot of safeguards to protect an accused person, or to see that he makes a full defence. I think that our system of criminal law is a good system and I think that it has given the accused every chance to get a fair trial. Yet you finished by saying that we should abolish the death penalty in murder. Do you not think that society should be considered also? Every day we read in the newspapers of many innocent people being killed by brutal murderers. I would like you to comment on what you think would refrain these brutal criminals from committing such crimes?—A. My answer to your question is this: The retention of the death penalty can only be justified so long as it is established to be the only effective deterrent to the crime of murder. If that assumption is right, and I submit that the assumption is right, then the considerations which you would invite me to apply are irrelevant. They are considerations which ought to be taken into consideration if punishment is justifiable on some theory of retribution or of revenge.

In my submission it is fundamentally wrong to say that because an accused person has committed a brutal crime he should, for that reason, be executed. My submission is that such an accused person should only be executed if his execution, or the execution of others like him, is established to be the only effective deterrent.

I submit that the successful experiment of thirty-six other jurisdictions with abolition establishes with reasonable conclusiveness that the death penalty is not the only effective deterrent.

Q. Is it not true that the death penalty is no more considered as a deterrent? In that case the word "deterrent" is used in a different sense from the way we interpreted it before. And as I was saying, the way to prevent other criminals or persons with criminal intent from committing crimes—I am going to quote Mr. Justice Denning about it and ask you to comment. Mr. Justice Denning said:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else... The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

What do you think of that?

Mr. WINCH: On a point of order, I ask whether we are debating the subject or asking a question?

Mr. BROWN (Essex West): Could I ask that Mr. Boisvert give the citation?

Mr. BOISVERT: The citation is the report on capital punishment, 1949-1953, by the royal commission in England, page 18, at the top of the page.

The PRESIDING CHAIRMAN: Before the witness answers the question: I do not think we ought to get into the field of debate. What I wanted to point out to Mr. Boisvert is that the witness has said that if the death penalty is based on the view that it should be retribution or revenge by society on the person who commits a murder, then on that basis that is a justification for the death penalty, or if you can establish that the death penalty is in fact a deterrent, then that would be a basis for supporting the death penalty, but if it is not a deterrent in fact, then the witness suggests that there should be some reconsideration of that problem. Now, that is his view and I do not think we are going to get any further by arguing with him or telling him what Lord Justice Denning or anybody else says.

Mr. BOISVERT: I am in full agreement with you, Mr. Chairman. I think I went too far into this discussion instead of asking a question of the witness.

The PRESIDING CHAIRMAN: Have you nay other question, Mr. Boisvert?

The WITNESS: Mr. Chairman, did I understand you to say that I justified the death penalty on any other basis than that it was justified only if it was shown that it was the only effective deterrent?

The PRESIDING CHAIRMAN: You put a hypothetical question. I understood you to say that if a visiting of retribution or revenge was considered a basis for the death penalty, you support that basis.

Mr. BOISVERT: Mr. Maloney, would you make a suggestion about improving the safeguards which are provided by the Code to grant an accused person a fair trial and a full defence?

The WITNESS: Mr. Chairman, the answer to that question, in my submission, would be this: the simple certain improvement would be complete abolition. Anything short of that will not result in a complete safeguard, but, for example, to carry out some of the recommendations made in England would have the effect of adding many safeguards. For example, among their recommendations is not to execute anyone under 21. Secondly, they would

pass to the jury the responsibility of determining whether or not the individual convicted of murder should be executed. They would enlarge the sphere of mental abnormality within which convictions for manslaughter could properly be made; and there are other recommendations as well which, if given effect, would have the effect of adding safeguards. But the only complete safeguard would be abolition.

By Hon. Mr. Bouffard:

Q. It would be a complete safeguard for the accused, but not so much for society.—A. Again we go back to the original question. Do we approach this question of punishment from what I submit to be the only proper approach—that is, is it the only effective deterrent—or do we look at it from some other basis founded on some concept of revenge?

Q. Do you admit that it is a deterrent?—A. I admit that it is a deterrent.

Q. A very important one?—A. I do not agree it is important, unless you mean by that it is a drastic one.

Q. I mean "important"; I do not mean "drastic".—A. I do not think it is the only effective deterrent.

By Mr. Brown (Brantford):

Q. Mr. Maloney, you stated that at preliminary hearings in trials it has been your experience that the Crown does not in practice reveal its case to defence counsel. Did I understand that to be a statement that you made?—A. What I said, Mr. Chairman, was this, that in practice in the majority of cases in my experience Crown counsel only reveals so much of his case as is necessary to enable the magistrate to fulfil his function.

Q. I see. What is your experience in respect to the Crown revealing its case to defence counsel?—A. My experience has been in the majority of cases that the Crown's case is not revealed at that stage to a degree that eliminates surprise. Let me give you an illustration of what I mean. In the case of Leonard Jackson, to which I referred, he was charged with the murder of Detective Tong. One witness—another detective—in the company of Detective Tong identified Jackson as one of the persons who fired a gun at the scene of the crime. As it developed at the trial, although this was unknown to the defence at the time of the preliminary hearing, there were approximately five witnesses in addition to the other detective who were in the vicinity of the scene of the crime, who had evidence to offer concerning Jackson's participation in it. At the preliminary hearing the one fellow detective was called to testify in regard to what he had seen, but the Crown did not disclose the existence of or the nature of the testimony of the other eye-witnesses in the vicinity of the crime. In other words, we were completely taken by surprise as to what they would say.

Q. Mr. Maloney, the reason I asked that question is this: At a previous sitting of this committee we had before us Mr. W. B. Common, the Director of Public Prosecutions for Ontario, and he stated that it was the custom of the Crown to reveal almost fully its case to defence counsel.

Mr. WINCH: He said all of it.

Mr. BROWN (*Brantford*): I want to give you his answer to the question I am quoting from his submission to the committee, page 77. He said:

> I might say for those members of the committee who are unfamiliar with the procedure at a trial—and I am not going into technical matters, it will suffice to say this: that in all of the cases, not only in capital cases but usually in all criminal cases, there is complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no "fast ones" pulled by the Crown.

then he went on and said:

> The defence does not have to disclose its case to the Crown. We do not ask it for a complete and full disclosure of the case.

I would like to have your comment on that?—A. In answer to that, I say that Mr. Common's understanding of the present prevailing practice is not correct.

Hon. Mr. GARSON: That is in his own department.

The WITNESS: His understanding of the present prevailing practice.

Hon. Mr. GARSON: In his department.

The WITNESS: Mr. Common's official position is director of public prosecutions for the entire province. The figures in these criminal cases when they reach the stage of appeal. He is the superior officer of all Crown counsel in the province, but he is not connected personally with the conduct of preliminary inquiries, and his understanding of what some of his junior officers always do in that capacity is not correct.

Hon. Mrs. HODGES: Do you say "not correct" or not in conformity with your understanding of the procedure?

The WITNESS: I would say that it is not correct in my personal experience, and I have given you, I think, one illustration of that in the case of Leonard Jackson.

Hon. Mr. BOUFFARD: Have you ever complained to him?

The WITNESS: I have complained in magistrate's court. I have never lodged a complaint with the department.

Hon. Mr. BOUFFARD: He says it is the policy of the department. If the junior counsel do not follow that policy, do you not think it might be a very good thing to complain to the director that his junior officers were not doing what they were told?

Mr. BROWN (*Essex West*): You might thereby invoke the wrath of the Crown attorney you have to fight against.

The PRESIDING CHAIRMAN: If you are practicing law and are well known in these fields sooner or later you get into every Crown attorney's bailiwick, and if you are a complainer, you are in trouble.

Can we follow our procedure?

By Mr. Brown (Brantford):

Q. Mr. Maloney, I think you stated in respect to the prerogative of mercy that the department tends to refuse clemency where all appeals have been denied. Are you stating that from your experience or from something else? Do you say that that is the situation in Ontario.—A. I base that on two of the cases to which I referred.

Q. From your own personal experience?—A. Cases in which I was informed to this effect by officials of the department in the course of my consultations with them: "A jury has decided against you, so has the court of appeal, so has the Supreme Court of Canada and you have not shown us any reason to interfere".

Q. Could you say that that is a general rule?—A. I limit it to the personal experience I have had. As I said, I do not know what policy the department pursues in this respect, and when ultimately that policy is disclosed to you, as I suppose it will be, that is a matter that ought to be explored.

Q. I have just one other question. I believe you stated that you felt that juries often would recommend clemency, but they are not aware that they have that right. Would you explain to me why that could not be suggested by defence counsel or brought up at the trial. Why has not a defence counsel

the right to suggest clemency? If they come to the conclusion that an accused is guilty they still have that right.—A. It is regarded as an improper reference to make to the jury for the reason I suggested that there is a danger that they might arrive at a compromise.

Q. You feel that it hurts your case?—A. No, no. Under our law it would be an improper comment to make. What I have often thought might be done—and I do not know that any change in our legal machinery would be necessary—would be that after an accused man is convicted of murder it would be open to the judge before the jury is discharged to invite them to return to the jury room to consider whether or not they would like to bring in such a recommendation. But, I know it has been held under the authorities that it is improper for a trial judge to refer to the jury's right to bring in a recommendation during the course of his charge.

By Mr. Cameron:

Q. I would like to thank Mr. Maloney for the very clear presentation he has given from the standpoint of defence counsel to the safeguards thrown around a person charged with a capital crime, and I desire to ask him two questions. There are many I would like to ask him. My first question is: there have been cases of a person having been discharged by a magistrate on a preliminary inquiry on the ground that the Crown has not made out a prima facie case justifying the magistrate sending it on for trial. That is a fact?—A. Yes.

Q. So there have been some cases where that safeguard has been effective? —A. Yes.

The PRESIDING CHAIRMAN: There have been cases too where the magistrate has found that the Crown has not made out a case on the preliminary, but subsequently an indictment has been preferred before the grand jury and a true bill has been found and the man put on his trial in any event.

The WITNESS: In fairness I must point out that that is not common. I cannot think in recent times of any cases where the Crown has done that.

The PRESIDING CHAIRMAN: I am speaking from personal experience.

By Mr. Cameron:

Q. You referred to the case of Rex vs. Hughes and a subsequent change by statute bringing the law back to the position it had been interpreted to be before 1942. In your opinion is that a retrograde step in criminal administration or not?—A. In my opinion it is, because it enlarges the number of persons liable to the death penalty who—are guilty of what is called constructive murder, that is—persons who cause death accidentally in the course of the commission of a crime.

Q. I asked that question because I am glad you offer further support for the same position I took when that particular section was before a committee of this House.—A. In general experience it is practically impossible to defend an accused person to whose case the provisions of that amendment apply unless your defence is mistaken identity.

By Mr. Lusby:

Q. Does your experience in criminal courts extend to any province other than Ontario, Mr. Maloney?—A. No sir, except that I have been consulted in an advisory capacity in regard to two or three prosecutions in the province of Quebec.

Q. Is your experience confined entirely to the defence side of the proceedings? Have you had any experience with prosecutions yourself?—A. None, sir, whatever.

Q. I do not want to take up the time of the committee with discussing the merits of Crown prosecutors, but I think I would just like to say briefly that so far as my own province is concerned, some of these practices you ascribe to Crown prosecutors are not indulged in.

Hon. Mrs. HODGES: May we ask what province that is?

Mr. LUSBY: Nova Scotia.

By Mr. Lusby:

Q. There was one thing I was interested in. You said these convicted men with whom you said you had become close, were not insusceptible to reform. Do you mean by that they showed repentence for their crime for which they were convicted?—A. I had three or four cases in mind when I said that. These were cases of men who admitted their complicity in the crime and in three cases they indicated, as strongly as could be done, a serious feeling of repentence for what they had done. The fourth person whose case I referred to persisted to the last in his innocence, so had no occasion to display any possible feeling of repentence.

Q. Did these men who admitted their complicity show signs of regret before or after the conviction?—A. That is a difficult, although a very fair question. I would say they displayed it before their conviction, but to a much greater degree afterwards.

Q. So it would be, at least in part, brought about by the circumstances in which they found themselves? In other words, they had been convicted and the mere fact that they were facing death would perhaps in itself be a considerable, shall we say, incentive to remorse?—A. That may well be so; I couldn't dispute the accuracy of that, although I would like to go on to say this: if you view their state of mind at that stage of their case as evidence from which you can infer that the death penalty is a deterrent, I do not subscribe to that view.

Q. You do not think the death penalty is more of a deterrent than life imprisonment?—A. Based on the study I have made, where the death penalty has been successfully abolished in certain jurisdictions, it has not proved itself to be the only effective deterrent.

Q. Perhaps I shouldn't ask for your own opinion, but if you were planning a cold blooded murder, wouldn't you be less likely to carry it out if the possible consequence were hanging?—A. With great respect I think that is the source of error in the thinking of many persons who approach the problem of the death penalty. We are all too prone to sit down coolly and calmly and to say, would be personally be deterred if we were in a certain set of circumstances. Now, that ignores some important facts. In the first place, we are talking about human beings who are quite different in their way of thinking, in their upbringing, in their background and in their general way of life from you and from the other members of the committee, and it would be unsafe to arrive at an answer to the question of whether or not the death penalty is a deterrent, by applying that test. It also overlooks the fact that when murders are committed, with some exceptions but only some and not many, they are committeed at a time when there is no opportunity for such reflection.

Q. Yes, but I was speaking of the deliberate planned cold-blooded murder. Don't you think it might be a deterrent in a case like that, even though they may not constitute the great majority of murders? Perhaps what I am trying to get at is this: do you say that in no case of murder the death penalty would be a more effective deterrent than any other? I realize in a great many of these what you might call hot-blooded murders, probably it wouldn't be, but do you think it never would be in any conceivable case?—A. I can think, by reference to my study, of the subject, of cases in which there is

some evidence that the offender reflected in the manner you suggested before he committed his crime. For example, you will find, if you read the debates of New Zealand, reference to a prisoner who is not identified, who several weeks or months before the commission of the crime, and evidently at a time while he was planning it, expressed the view to his associates that he did not fear his plan to commit a crime because he knew he would not be executed. Now, that is the only case in New Zealand where that state of mind before the commission of the crime was proved; and as I read the debates—although, mind you, the references to the various cases mentioned are not clear—as I read the debates I understood that that particular offender was one who was suffering from some serious mental abnormality and therefore would not have been executed anyway. Now I notice that there are cases too in the United States, but amazingly few, in which apparently there is some evidence that the offender brought the victim from a death penalty State to a non-death penalty State and there carried out the crime, and I notice they are referred to in the appendices of the royal commission report in England. But, can you determine what it is right to do in regard to the question of the death penalty by selecting the cases of two or three individuals in that manner? Are you going to prevent a law of this nature from being enacted in our country simply because all over the world you find a few isolated cases?

Q. Well, of course, that might depend on how many there were. However, I do not think I should get into an argument with you. There was one further question I wanted to ask you. You, of course, favour the abolition of the death penalty. What would you consider as a good substitute, life imprisonment?—A. Imprisonment for life, but not with the expectation that the prisoner would serve a life term, because the inducement that a prisoner would have from knowing he would some day be released would be the most reformative influence possible on him and would have a very salutary effect on his behavior in prison.

Q. Have you any idea how many persons who are in prison for life, say in Ontario, actually serve their full term?—A. No, I cannot answer that question. I think you will find the justice department will have exact statistics that will assist you there.

The PRESIDING CHAIRMAN: Senator McDonald?

By Hon. Mr. McDonald:

Q. Mr. Chairman, Mr. Maloney, I too wish to thank you for the very interesting talk which you have given us. Perhaps we, especially those of us who have been in government services, have heard rather more of the Crown prosecutor's side and not so much of the defence, and it is well for us to have this side.

I take it that you have, in your experience in capital punishment cases, always been on the defence?—A. Yes, always.

Q. I was interested in what you said about the death penalty not being a main deterrent. I understand now from what you said to Senator Bouffard that you feel it is somewhat of a deterrent?—A. I consider that the death penalty is a deterrent, just as any punishment is a deterrent. But I do not agree with the suggestion that it is the only effective deterrent and, if not, my submission is it should not be retained.

Q. May I ask your opinion as to whether or not Great Britain or England and other judicial centres reimposed the death penalty after having abolished it, because they felt it was a deterrent?—A. In the case of England, the death penalty was never abolished. Legislation was enacted in the House of Commons in the early part of 1948 abolishing the death penalty for a trial period of 5 years. It was subsequently submitted to the House of Lords for consideration and the bill was rejected, but in the intervening

period of a few months those who were awaiting sentence of death had their sentences commuted to imprisonment for life. The bill never did become the law of England.—New Zealand abolished the death penalty in practice in 1935, and abolished it by law six years later in 1941, but restored it in 1950; so that there was a total of 15 years experimentation with abolition in New Zealand. I could cite to you the statistics in regard to New Zealand which are to be found in the appendix to the report of the Royal Commission, in England, at page 342 of that report.

The PRESIDING CHAIRMAN: Now, Mr. Dupuis.

By Mr. Dupuis:

Q. You have mentioned four cases of murder where the condemned was given executive clemency, and three others who were hanged. You mentioned particularly one case in which the accused had already been found guilty but sustained his innocence to the end. In that particular case was the accused convicted upon circumstantial evidence only?—A. No. He was convicted of the murder of a young girl aged nine, whom it was alleged he had violated and then murdered, and whose body, it was alleged, he had destroyed. No trace of her body was ever found. He was arrested or apprehended at a time when he was attempting to commit suicide and he made a statement in which he confessed to having committed the act which resulted in her death. At his trial he repudiated his confession and said that he had made it in a state of despondency and depression and in order to accomplish what he had long tried to do unsuccessfully, that is, to commit suicide.

Q. In other words, he confessed?—A. He confessed.

Q. Now, what about the two other cases? Were the parties convicted on circumstantial evidence only?—A. The three other cases, you mean.

Q. No, the two other cases. You said in the beginning, if I understood you correctly, that probably those four should have been given executive clemency because some of them would not be guilty?—A. I did not intend to say if that clemency was warranted on the ground that they were not guilty. That was not the ground on which I said that they should have been given executive clemency.

Q. Excuse me. Even so, were the two others who were hanged found guilty on circumstantial evidence only? That is, if you recollect the cases, otherwise, you cannot answer. You do know the difference between a man convicted on direct proof and on circumstantial proof. So I wonder if you recollect whether those two men were found guilty after only circumstantial proof?—A. There is only one case I know, out of all of the cases I have referred to, in which the testimony on which the accused was convicted was solely circumstantial.

Q. Another question is this: You have just referred us to a book published by Professor Borchard of Yale University entitled "Convicting the Innocent", in which the author refers to 65 cases, and out of that number 25 were murder cases. Of course you just said that you do not know of anybody being hanged who was afterwards found to be innocent.

The PRESIDING CHAIRMAN: In Canada.

By Mr. Dupuis:

Q. In Canada. And I want to ask you a question which comes up at this time, in my humble opinion: the fact that a person is dead, after being hanged, do you not think results in not finding any other person guilty of the crime for which he has been hanged?—A. I agree wholeheartedly with you, Mr. Dupuis, that all interest in the inquiry as to his guilt or innocence terminates upon his death.

Q. Is it not true that in the cases you have referred to, in which the accused were first found guilty but were afterwards found to be innocent, they had some opportunity to look after their own defences, an opportunity which would not have been afforded to them if they had been executed? They had an opportunity to seek interested people in their own defense, and to seek interested counsel, or police, or points of law which permitted them to prove their innocence, whereas in the case of the accused or convicted person who was hanged, he had no such opportunity?

In many cases I have found police officers say: "We are not going to look for another person because we have the guilty one in our hands and that ends our case as far as we are concerned." So the police are no longer interested in following up the case. In the case of robbery or any other non-capital criminal offense, there is an opportunity for the innocent person to prove that he is not guilty and in many cases it has been found that he was not guilty. Is that not right?—A. I would like to subscribe to the things you have said, Mr. Dupuis.

Q. Thank you very much.

The PRESIDING CHAIRMAN: Now, Mr. Thatcher.

By Mr. Thatcher:

Q. Mr. Maloney mentioned that very frequently condemned murderers were defended by inexperienced or young lawyers. I would like to know why that is. Is it perchance because the fees which the Crown usually gives for that service are not sufficiently attractive?—A. Well, the present practice in Toronto or in Ontario I should say is this: We have set up the machinery of legal aid and it is through the instrumentality of that organization that defence counsel are now obtained in cases involving an indigent accused person. Prior to the setting up of that machinery there was a policy whereby any indigent person charged with murder could secure the services of the counsel of his choice, provided that such counsel was willing to accept payment from the Attorney General, at the rate of $40 per day for each day of the trial. But now there is no provision to provide compensation for counsel.

Q. There is no compensation for counsel? I do not follow you? Do you mean that if a lawyer is named by the Crown to act as defense counsel that he does not receive remuneration?—A. No. He is not named by the Crown. He is appointed by legal aid to act as defense counsel at the request of the prisoner. He receives no compensation except for out-of-pocket expenses, such as would be incurred in or during the transcript of the evidence taken at the preliminary hearing.

The PRESIDING CHAIRMAN: And I think in that connection there is a preliminary investigation in order to determine whether the accused who seeks legal aid is in a position to pay for it.

The WITNESS: Oh yes.

By Mr. Thatcher:

Q. I understood from Mr. Justice Hope the other day that the Crown provided legal fees for defense counsel.—A. No. At one time there was an arrangement, as I have just said, whereby legal aid would be secured by the Crown provided defense counsel was willing to accept payment of $40 per day for each day of the trial.

Q. Do you not think that is something that should be changed. Do you not think that in the interests of justice defense counsel should be paid by the Crown to make sure that the accused person will get a proper defense?—A. Well, an arrangement of that kind might lead to many complications. I think the proper solution to the problem would be this: That any accused, proved to be indigent, charged with murder should have available to him the services of the

most accomplished and capable legal counsel in the vicinity without fee. The burden of defending such cases would be equitably distributed among the respective counsel available.

Q. But he cannot obtain that under the present law?—A. Under the present law there is no requirement whereby leading legal talent need defend.

The PRESIDING CHAIRMAN: Since legal aid came in, some of the senior counsel in Toronto in criminal law have taken on cases and have successfully defended people.

Mr. THATCHER: But, Mr. Chairman, I would also remind you that the witness said that, in the big majority of cases he knew of, it was young and inexperienced lawyers who were defending these cases.

The PRESIDING CHAIRMAN: On average, that would be right.

The WITNESS: May I make a suggestion? The statistics that the Department of Justice would have at its disposal would, I think, disclose or contain information that would enable you to determine how many cases in the period of the last ten years, let us say, involved persons convicted of murder who had been defended by youthful inexperienced counsel. An examination of the record of such cases would enable you to see to what extent that situation has existed.

By Mr. Thatcher:

Q. There is another point I was interested in, Mr. Maloney. You said that juries are not informed of their right to recommend mercy. Do you feel that the law should be changed in that regard, so that the judge at each trial should point out to juries that particular right?—A. I can see the danger of pointing out to the jury their right before they render a verdict.

Q. Once they have rendered a verdict, it is too late.—A. No, my view is that the jury should be instructed to return, and that the jury before they are discharged should determine whether they would recommend mercy.

Q. So you just recommend a change to the committee along those lines, from your experience?—A. If my recommendation as to abolition is not carried out, and if my alternative recommendation that the responsibility for the death penalty be placed in the discretion of a jury, as recommended in England, is not carried out either then I would suggest that as a final alternative.

Q. There is another point I would like clarification on, either this morning or later. That is, this executive clemency. As a defence counsel, what is your procedure to get a hearing from—I think you would call it—the executive, or the cabinet, or whatever it is?—A. The procedure I have followed in most of these cases is, after consultation with my client, to prepare—I should not really call it a brief, because it is not sufficiently formal to be called a brief—a detailed letter setting out such facts as in my knowledge I consider important and likely to be of assistance to the minister. I had two cases, which the minister may not recall, where I had occasion to speak on the telephone to Mr. Garson about them. He has displayed on those occasions a very great anxiety and a great desire to get whatever help I could be to him, so that the procedure has always been quite informal. It involved a letter with the facts in it. It involved in two cases a telephone conversation direct with the minister.

Q. Do you usually get a personal hearing? Does the defence counsel usually get a personal hearing?—A. The minister gives you every reason to believe that he would like to give a personal hearing, if you think you could add anything to the representations. I think that is a fair statement.

Hon. Mr. GARSON: That is right. As a rule they do not apply for a personal hearing.

Mr. THATCHER: I have just another question, Mr. Chairman. I do not want to rush in.

The PRESIDING CHAIRMAN: I am not rushing either.

By Mr. Thatcher:

Q. If the committee should not decide to abolish capital punishment, Mr. Maloney, do you think it would be advisable to consider using another method than hanging, such as the gas chamber?—A. I must be careful not to say anything that would be designed to influence the committee on a matter that is out of my field. That is essentially a medical problem. I was rather surprised in reading the English report to learn that of the various forms of execution that they considered they recommended the retention of hanging as being the most humane and most decent form of execution. With what experience I have had in the field, if hanging is retained, the committee should recommend that some precaution be taken whereby the possibility of consciousness after the accused offender has been dropped should be completely eliminated. I was very much alarmed to learn of a case—I will withhold the name, but submit it in a memorandum if you wish it—of a convicted murderer in Toronto as recently as the early 1940's, who at the time of his execution apparently, according to one witness with whom I spoke, was conscious after the drop and was making such sounds and gestures as would indicate to the people around that he wished to be taken out of his torment. They have not apparently had that experience in England because according to the report in fifty years there is no mention of an unsuccessful execution by hanging, but I think this committee should investigate the skill of our present executioners in Canada and satisfy itself of their ability to do the job skillfully as it is done, evidently, in England. I would have thought to eliminate any possibility of consciousness after the drop a medical man could administer in the arm or some other part of the body of the suspended prisoner some narcotic or drug that would completely eliminate the possibility of consciousness.

Mr. THATCHER: Perhaps they should administer the drug before.

The WITNESS: In administering the drugs often the cooperation of the prisoner is required and if administered intra-venously it must be administered with great skill, and if administered muscularly it could be quite painful. I recommend you read the English report in that respect.

By Mr. Winch:

Q. Under the present Act if the accused is found guilty it is mandatory for the judge to sentence under this charge. If capital punishment is maintained, do you think that the judge should have more discretion regarding the sentence of death or life imprisonment or that there should be degrees of murder as they have in the United States?—A. I do not think the discretion of determining whether or not the death penalty should be imposed should be vested in the judge. It is too terrible a responsibility to pass on to one man. Besides as I have already suggested one judge might differ from another judge in temperament, character and outlook. And this would lead to inequality. I would recommend that if the death penalty is to be retained that the discretion should rest with the jury, as recommended in England.

Q. Do you think we should have anything along the line of the United States as to degrees?—A. I had an open mind on that subject until recently, and my view is that the solution of these problems is not to establish degrees of murder. The reason for that is that to try to establish degrees of murder you are going to have to resort to cumbersome legalistic phraseology that is going to give rise to interminable appeals and problems of that nature. Degrees are not the solution. I subscribe to the solution suggested by the commission in England.

Q. You said you became quite close to a number of these men who had been convicted of homicide? Were you able to get close enough to their thinking, or did you get any expression from them, as to which they feared more, capital punishment or being incarcerated for life behind the walls of a prison?—A. I can say without exception in all the cases I have mentioned, if they had been given the choice they would have elected to take imprisonment for life, and I hasten to say if you will permit me to, that my submission is that that is no evidence from which this committee will be entitled to infer that the death penalty is a deterrent.

The PRESIDING CHAIRMAN: Senator Hodges?

By Hon. Mrs. Hodges:

Q. Don't you think that establishes the fact that these men, fearing the death penalty as they do, were cowards? Of course, you would expect the coward's point of view from someone who committed a cold-blooded murder. —A. In the first place, I do not agree at all that because a person—no matter what his position—fears death he is a coward.

Q. But that is a different question. You are getting away from the point. The point is, if he fears death under those conditions?—A. I don't think there is room for argument or that it supports the theory that he is a coward.

Q. Yet you say he would rather have the penalty of life imprisonment? —A. Yes, but I do not think we can infer from that that the people are cowards.

Q. However, I think a murderer is a coward, anyway. We will let the question go. Another question I would like to ask is this: I was very interested in your suggestion that in a great many of these cases the prisoners lose out because of the lack of experience of the defence counsel. Are you trying to imply by that that with more experienced counsel they would have a fair chance of escaping their sentence or do you mean to imply they would have a better chance of escaping through legal loopholes?—A. By that statement I mean that where a person is charged he is entitled to the most experienced counsel possible, not to avail himself of what you call legal loopholes—but to insure to the best of his ability that the offender's conviction is not brought about except on proper evidence and after a trial according to law and after the application to his case of all the rules of law we have built up to insure fair trials. Now, a counsel who performs that function, performs, in my submission, a duty to society, and an experienced counsel will perform that function, by virtue of his experience, with greater skill than an inexperienced counsel, and where the charge is murder and the penalty is so drastic, I think there is an inequality in the law which results in people in poorer or impoverished circumstances having to be denied the assistance of some counsel of great competence and experience.

Q. What you mean to imply is that by providing them with competent experienced counsel it would help to offset the impression you have given us of the apparent fallability of judge and jury and prosecuting counsel?— A. I agree with that. It would help to offset, yes. I do not think you will ever remove the situation where the poor cannot always be defended by the most talented counsel. That inequality exists in every facet of our society.

Q. It could possibly also exist even if he paid the highest price?—A. What do you mean?

Q. Even if he secured the services of the most high priced lawyer—and I say this with all due deference to the lawyers present—it doesn't mean that he has a talented or experienced counsel?

The PRESIDING CHAIRMAN: Mr. Fairey?

By Mr. Fairey:

Q. My sheet is pretty well cleared by all the questions that have been asked. I have just one question which I jotted down here. I was disturbed when you said that the evidence adduced at the preliminary hearing was not all disclosed by Crown counsel. Would it help if the law was changed to say that no additional evidence would be adduced at the trial which was not adduced at the preliminary hearing?—A. That legislative change would completely eliminate the danger that I say exists now. I should not call it a danger, but it would eliminate the matter I have criticized in regard to preliminary hearings, but from the point of view of the administration of justice it might not always be practical because a witness may be discovered after the preliminary inquiry who ought to be called for the proper administration of justice.

Q. But that information could then be transmitted to the defence counsel in plenty of time?—A. Yes, perhaps an amendment to the effect that no witness could be called to testify at the trial who had not testified at the preliminary hearing, or a summary of whose evidence had not been disclosed to the counsel for the defence, would be effective. That would remove the basis of my criticism in regard to preliminary hearings.

The PRESIDING CHAIRMAN: Mr. Valois?

By Mr. Valois:

Q. I wonder if my English will be equal to the questions I would like to put to you. I do not want to put words into your mouth which you have not spoken. Are we to draw the conclusion from what you said that you are against the death penalty because you feel it is not the only effective deterrent, and secondly because there are miscarriages of justice and the safeguards that are supposed to be in existence so far as the accused is concerned, are in practice very much less than we are led to believe? To go into another field, what would you say is the effect of imprisonment for burglary, is that a deterrent?—A. Oh, undoubtedly.

Q. It is?—A. Yes.

Q. That is something I do not understand very well because if we examine statistics, although we have had jails and prisons for as far back as we can remember, I think the statistics will reveal that we still have every year a good crop of burglars and thieves and so on. The idea I am trying to put to you, sir, is this: I think it might be well to start from one point, that it is human to make a mistake, and that no matter what protective or preventive measures we take, or the law may provide, it is bound to happen—there will be mistakes. This all happens in the field where the accused, if convicted, is sent to jail because he is found guilty of theft or burglary. It may happen that if a man is convicted of having killed somebody he would be hanged. It will always happen and I am afraid that if we abolished the death penalty because there might be mistakes or miscarriages of justice, then what is the use of having penitentiaries?—A. With respect, I do not see how you arrive at that conclusion on the reasoning you have offered. If I understand you correctly, first of all, errors of justice and mistaken convictions can be rectified where the death penalty has not been carried out, but they cannot be rectified where the death penalty has been carried out. I do not for a moment subscribe to the belief that we should do away with prisons. A lot of our difficulty is with repeaters at the present time and it is due largely to a concept of punishment that prevailed not only in our country but in many countries for a long period of time.

The approach to crime and punishment generally has commenced to undergo a change which you see reflected in great improvements in prison systems throughout the world. If you were to compare the prison system

in Canada today with the prison system in Canada 25 years ago you would be quite amazed at the different approach to the problem of punishment today, since it is designed not solely to punish the offender but to help to correct whatever problem might have caused him to violate the law. I think that improved prison treatment will ultimately result in less crime.

The PRESIDING CHAIRMAN: Now, Mr. Minister.

By Hon. Mr. Garson:

Q. I should like to endorse what has been said by the other members of the committee concerning our gratitude to you, Mr. Maloney, for coming here. If we are going to make any headway at all we shall need to have a balanced picture. We have already had a heavy representation of the prosecution side until you arrived.

There are a couple of points which you raised which I would like you to confirm. The impression I got from your remarks was that capital punishment is a not deterrent to capital offenses.—A. It is not the only effective deterrent.

Q. Then what other deterrents are there, in your opinion?—A. A sentence of imprisonment for life, not necessarily involving the serving of life imprisonment, in my opinion is established by the successful experiments of other jurisdictions to be an equally effective deterrent.

Q. In measuring whether capital punishment is a deterrent I gather, and perhaps wrongly, you base that on the quite extensive experience you had as defense counsel in actually meeting those men who had been proven to be guilty.

The PRESIDING CHAIRMAN: I do not think the witness is being heard.

By Hon. Mr. Garson:

Q. I am sorry. I gathered from Mr. Maloney's testimony that he had based his conclusion that capital punishment was not the only effective deterrent upon the contacts which he had had with men who ultimately had to suffer capital punishment. That is the basis, is it not?—A. I did not mean to base my conclusion that it was not the only effective deterrent on the limited experience I derived from having been associated with the cases of five or six persons under sentence of death. I also base my conclusion on the study I have made of the subject and particularly my study of the successful experiments conducted in the other jurisdictions in which they have abolished it.

Q. Have you ever had contact with any person, to your knowledge, who had contemplated murder but who had been deterred from committing murder by fear of capital punishment?—A. No, I have not.

Q. You expressed some admiration for the report of the Royal Commission on Capital Punishment. I would like to read to you from page 20 of that report and ask you if you agree with it.

> 59. Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged. For that we have to rely on indirect and inconclusive evidence.

Would you agree with that statement?—A. Well, no; or if I do, then with some qualification. For example, let us repeat the sentence which the Minister has read:

> No one can ever know how many people have refrained from murder because of the fear of being hanged.

Implicit in that statement is the apprehension that if you were to abolish the death penalty, then those persons who had refrained from committing murder before abolition, or like minded persons, would now commence to

commit such crimes. How do you test the validity of that statement? The only way you can do it is on the best available evidence. Look to the jurisdictions in which it has been abolished. Look to New Zealand. If the apprehension implicit in that statement is right, we would have thought that in the period of abolition all those persons who might have been restrained from committing murder by reason of the death penalty before its abolition would now have commenced to commit murder and that acordingly the murder rate would indicate a very great increase. But in actual fact that is not the experience of any of the jurisdictions in which the death penalty has been abolished. That is why I answered that question in the way I did.

Q. You base it on statistical evidence?—A. Yes sir.

Q. Now let me refer you to page 22, paragraph 62 of the Royal Commission Report, and I read:

> 62. We must now turn to the statistical evidence. This has for the most part been assembled by those who would abolish the death penalty; their object has been to disprove the deterrent value claimed for that punishment.

Would you agree with that statement? It is a statement of fact.

The PRESIDING CHAIRMAN: It is certainly one of the purposes.

The WITNESS: Yes, one of the purposes, but—

By Hon. Mr. Garson:

Q. If you do not agree with it, I do not propose to comment myself. You say you have made a study, but do you agree with this statement of fact?—A. You mean that, that is the object of people who want to abolish the death penalty?

Q. No, do you agree or disagree with the statement that I have just quoted?—A. I am not in a position to agree or disagree.

Q. You would not question it, then?—A. No.

Q. Then, with regard to this comparison that you say should be drawn, I direct your attention to paragraph 64, to this quotation:

> An initial difficulty is that it is almost impossible to draw valid comparisons between different countries. Any attempt to do so, except within very narrow limits, may always be misleading. Some of the reasons why this is so are more fully developed in Appendix 6. Briefly they amount to this: that owing to differences in the legal definitions of crimes, in the practice of the prosecuting authorities and the courts, in the methods of compiling criminal statistics, in moral standards and customary behaviour, and in political, social and economic conditions, it is extremely difficult to compare like with like, and little confidence can be felt in the soundness of the inference drawn from such comparisons.

Would you agree with that?—A. No, the only relevant statistic from any jurisdiction which has experimented with abolition is the number of homocides that have been committed in such country, how many people have been killed unlawfully; and there is no such wide variation in law that would require you to say that owing to the differences in legal definitions of crimes it is not helpful to refer to statistics. The only relevant statistic is how many people have been unlawfully killed. You do not have to resort to complicated legal definitions applicable to different jurisdictions to determine that. Secondly, when you consider the jurisdictions where abolition has been experienced with, they are sprawled across Europe and the United States, you go to New Zealand, even in Asia, in South America. Now, how can we say that such—shall we call it?—a cosmopolitan group of nations representative of every type of race

and creed, some countries industrial, some agricultural, some mainly urban, some mainly rural, how can we say that it is impossible to make an effective comparison? That is why I do not agree with that statement.

Q. You do not agree?—A. I contend that an effective comparison can be made with the other jurisdictions that have experimented with abolition, whereas this quotation you have mentioned rather would indicate that you cannot make such a comparison for the reasons the writer gave.

Q. Well, would you say that the experience, we will say, of a homogeneous population like that of Sweden, long established and settled, with one language, mainly one religion, and one way of looking at life, with the abolition of the death penalty, would be clearly indicative of the result that you would get by abolishing the death penalty in the state of Illinois in the United States?—A. No, I do not think so. If the only jurisdiction that formed a basis of comparison was Sweden, it would not be an effective basis of comparison.

Q. What country would you suggest that would compare with Illinois?—A. I think you must take an accumulation of countries. In Europe there are only two democracies west of the iron curtain that have not abolished the death penalty, either by law or in practice. I submit that they represent racially, temperamentally and in every way a cross section. If you add to them, too, the people of South America and the people of New Zealand, they represent a cross section from which you could determine what ought to be done in Illinois.

Q. And you think that in these comparisons the differences in the legal definitions of crimes, in the practice of the prosecuting authorities and the courts, and in the methods of compiling criminal statistics, and the differences in moral standards, et cetera, do not affect the inferences and conclusions at all?

Mr. WINCH: There are many more questions and I would suggest that we have Mr. Maloney back if we can.

Mr. LUSBY: Are we going to have any opinion from Mr. Maloney on the other topics which are to be the subject of consideration in this committee?

The PRESIDING CHAIRMAN: No, I do not think so.

Mr. DUPUIS: If Mr. Maloney is not going to be back I have a question I would like to ask him because it is important to me if not to the committee.

The PRESIDING CHAIRMAN: Could you put your question in writing to Mr. Maloney and get the answer. It is now after one o'clock.

Mr. BROWN (*Essex West*): Could we go on for a few minutes?

The PRESIDING CHAIRMAN: Is it the desire of the committee to sit for another ten minutes?

Mr. THATCHER: Could Mr. Maloney not come back at four o'clock today and give us all a chance for a few minutes?

Mr. BROWN (*Essex West*): Would not three o'clock be better?

The PRESIDING CHAIRMAN: Shall we adjourn until three o'clock?

Agreed.

AFTERNOON SESSION

3.00 p.m.

The PRESIDING CHAIRMAN: Gentlemen, we have a quorum. The minister has a few questions. Mr. Minister, would you like to go ahead with your questions?

Mr. Arthur Maloney, Q.C., Chairman of the Committee on Criminal Justice, Ontario Branch of the Canadian Bar Association, recalled:

By Hon. Mr. Garson:

Q. Mr. Maloney, in your remarks this morning, I understood you to cite three cases in which there was what appeared to you to be a miscarriage of justice because of a mistake of law. As I understood the mistake of law as described by you, it was that for a long while the law upon that particular point which you were discussing had been interpreted by the courts as thus-and-so; and that on the interpretation of that law various accused persons had been convicted over a period of years. Then an appeal was taken to the House of Lords, I think you said, and the House of Lords' judgment was to the effect that the interpretation of the law previously accepted was not correct, and that that interpretation as it had been acted upon previously had never been the law. All of which I accept. My question is this: is it not a fact that the application of common law or of statutes to the facts of a given case has to be made as the judges in that case at that time interpret the law?—A. It is applied in the manner in which the judges interpret the law, and it is assumed that their interpretation of the law is correct.

Q. Yes, at that time, and that was the point that I wanted to make. Was it not a fact, in the very case that you cite, that until this appeal that you spoke of was taken to the court of last resort in England the general opinion had been in England by all of the judges of the trial and appellate courts, but not of the court of the last resort, that the law was as it was applied in all those cases in which convictions were registered?—A. Yes, Mr. Minister.

Q. And it was only because the taking of the appeal to the court of last resort resulted in a new interpretation of the law, and because of that principle that in making that interpretation they said that this is what the law has always been, that one could argue as you did that the previous view of the law which was accepted generally by the judges was an incorrect one?—A. Well, a lawyer's understanding of the problem involved in this question is this, that the House of Lords should not be deemed to have been given a new interpretation to the law. They were officially pronouncing what the correct interpretation was, and that over that long interval of time inferior tribunals had misinterpreted the law. Now, the vice in all that, as I see it, is that if such a question had been raised before the House of Lords at an earlier time, the correct interpretation of the law for the guidance of all trial judges and appellate judges in subsequent cases would have been pronounced at an earlier date and fewer persons would have been executed. I rely on that example as proving that for a long interval of time the law was incorrectly interpreted and that, therefore, there were a number of persons who may have been executed and who doubtless were executed under that misapprehension of the law. I am not sure that I have answered your question very satisfactorily. If I have not, I would like to have another try at it.

The PRESIDING CHAIRMAN: Is this the idea, that at whatever level in the courts you have a pronouncement as to the interpretation of the law, that is the law until such time as a court at a higher level makes some different pronouncement?

Hon. Mr. GARSON: Precisely.

The PRESIDING CHAIRMAN: And when it finally gets to the House of Lords, even if it is a hundred years later, we use the expression that the law has become settled.

By Hon. Mr. Garson:

Q. It has become settled, but in the meanwhile the law as it is interpreted by those courts to which it has gone is the only law which can regulate the conduct of citizens, either civilly or criminally; is that not a fact?—A. I would have to agree with that, sir.

Q. And it is only in the sense that the court of last resort has happened to reach a conclusion concerning the law, which has been different from that previously accepted, that it could be argued, as you argued, that the previous conception of the law was a mistake. It was a settled law until the time that the case had been taken to the court of last resort, was it not?—A. I do not agree that it was the settled law. I agree that it was believed to be the proper interpretation of the law.

Q. Then I suppose you would suggest, or would it not be implied by your argument, that perhaps, in those cases where there was any doubt upon a point of that sort, those who make a reference to the court of last resort should do so earlier in the day, so that the law could be settled on these points?—A. Yes, sir.

The PRESIDING CHAIRMAN: Any other questions?

The WITNESS: Could I develop one thing arising out of that? I was personally involved in a case in which, because of the limited jurisdiction in regard to appeals to the Supreme Court of Canada, a very important point of law was decided against the interests of my client and he was executed. Now, that point ultimately will be brought before the Supreme Court of Canada in some future case. That tribunal may well decide the point of law against the contention that I put forward, in which case no harm could be suggested. But if the Supreme Court of Canada should decide that point of law in favour of the view which was put forward on behalf of Chambers—which is the ease to which I refer—I think then that it could and would be argued that Chambers' case involved a serious miscarriage of justice.

By Hon. Mr. Garson:

Q. I am sure you will not misunderstand my asking this question. That being the case, was an appeal from the judgment of the court of appeal not indicated to the Supreme Court in the Chambers' case?—A. Yes, but this was the situation. The right of appeal to the Supreme Court of Canada in 1947 was even more limited than it is now, and to succeed in bringing an appeal before the Supreme Court of Canada at that time one had to show either (a) that there had been a dissenting judgment in the court below—that is the provincial appellate court—on a question of law, or (b) that the decision of the provincial appellate court, even if unanimous, was in conflict with the decision of another provincial appellate court in a like case.

The point of law involved in the Chambers case was this: could an accused person be convicted of murder on his own extra-judicial confession in the absence of evidence of a corpus delecti? The precise point had never arisen in Canada before in any other provincial appellate court. Therefore I could not bring my case within the second requirement. It did not come within the first requirement because there had been no dissent in the Ontario court of appeal. But, there are other decisions in the Empire and elsewhere which are in conflict with the decision of the Ontario court of appeal. If the question

should arise in some further case in Canada, I would have no doubt that leave would be given now to appeal to the Supreme Court of Canada under its broader jurisdiction.

Hon. Mr. GARSON: As a result of amendments made since that time?

The WITNESS: That is right.

By Mr. Shaw:

Q. This morning, Mr. Maloney, you recommended the abolition of the death sentence and I believe you recommended that the penalty should be life imprisonment but not necessarily imprisonment for life. What would you recommend as a yardstick for the period of time the person should spend in prison, the length of his incarceration?—A. In the first place it would be quite inadvisable and inappropriate to lay down any set period as being the period that ought to be served. I think that the period of imprisonment that ought to be served by any convicted murderer ought to be a substantial one. No matter how reformative the offender shows himself to be in prison, to be a deterrent and to impress upon society the grave view we take of the crime a substantial period of imprisonment should be served. Now, as to how substantial, that would depend on the susceptibility of the offender to the reformative influences brought to bear on him in the prison, his conduct in the prison and his opportunities for rehabilitation as determined by a board of experts. I do think if the death penalty is abolished and if life imprisonment is substituted for it, society would demand, and you should direct, that no such convicted murderer should be released back into society until he had satisfied persons sufficiently expert to pass judgment on his case that he was as close to a safe risk as was possible.

Q. In the case of a man who has been convicted of murder and sent to a prison, after an appropriate period of time is released, and then commits a similar offence, then what? Would you recommend imprisonment for life within its full meaning?—A. It may well be—and here is a question which I do not answer—that you should adopt the policy that is adopted in respect to those persons in the United States of America, namely preserve the death penalty for persons who commit another murder in those circumstances.

Could I just comment on one other thing; It is of interest to consider the statistics of other jurisdictions who have introduced abolition to see to what extent second murders have been committed by convicted murderers. For example, you will find in England that over a period commencing about 1920 to 1948, 174 convicted murderers who had their sentences of death commuted to life imprisonment were subsequently surrendered on parole back into society and out of that group of 174 one in 1947 named Walter Howland committed a second murder and a study of the circumstances of his case indicates to my satisfaction that the second murder was something the responsibility for which lay in the circumstances under which he was released. He was carelessly released.

Q. This morning one hon. member asked you a question about the practice in effect in certain of the states in the United States of America in respect to the degrees of murder. Do you not suggest at the present time, in view of what you have already said, that you would actually recommend degrees of murder? This morning you opposed it. You suggest one person serve a longer period of time than another, and you would take into consideration the nature of the crime, and you suggest the possibility of maybe continuing the death penalty for a second offender. That would constitute a recommendation of degrees.—A. I do not think that we are talking about the same thing. I think that degrees of murder are sufficiently covered under our law in its present state, subject perhaps to the provisions we mentioned this morning concerning

so-called constructive murder. My view is that the death penalty ought not to be carried out in such cases as that. The degrees of murder are different from the considerations that you apply in determining whether a convicted murderer serving a life sentence should be released. The consideration you apply in the latter case are based on his subsequent conduct after conviction in prison and how he demonstrates his capacity to submit to the reformative measures brought to bear on him in prison. Degrees of murder are confined to the circumstances under which the crime itself was committed. My fear about degrees of murder is that it will require us, as I said this morning, to introduce complicated legalistic phraseology which will be constantly before the courts for interpretation.

Would it be fair, Mr. Maloney, to suggest that what you recommend is, in effect, different types of treatment, let us suggest, for different murderers?—A. You mean, assuming that the death penalty has been abolished?

Q. Yes, and that life imprisonment is the penalty. You would then be treating different murderers in different ways under your proposed plan?—A. Yes, I would, particularly in regard to the length of imprisonment that would be required.

Q. I have one other question, Mr. Chairman, if you will permit me.

The PRESIDING CHAIRMAN: Certainly.

Q. This morning Mr. Maloney suggested, I believe, that the right or obligation resting upon a judge of imposing a death penalty where a man has been convicted of murder should be transferred to a jury. Would you care to elaborate on your views in that connection? Why do you feel this should be transferred from the justice to the jury?

The PRESIDING CHAIRMAN: Is that what you said?

The WITNESS: No. It may well be, however, that I did not make myself clear. Under our law, in its present state, the sentence of death is the mandatory penalty which must be imposed on an offender convicted of murder by a jury. That is, it is not a matter of discretion for the trial judge. He has a duty in law imposed upon him to pass this sentence once the jury have convicted for murder. What I suggest, in the event the committee does not ultimately recommend complete abolition of the death penalty, is that you recommend the implementation of the plan proposed by the present royal commission in England; namely, that you impower the jury to decide in each case whether the punishment of imprisonment for life should be imposed rather than the death penalty. Now, the commissioners in England, and I believe they all concurred in this recommendation, recommended that the possibility of introducing this proposal into Great Britain was examined and the conclusion was reached that a workable procedure could be devised. In other words, the recommendation made in England is this, that the jury impanelled to try the issue of the accused man's guilt or innocence, do so, arrive at a verdict, and having done that, that something in the form of a secondary trial immediately take place before them in which they hear additional evidence which would be helpful to them in determining whether the penalty ought to be imprisonment for life or death by hanging. That is the system in vogue in a number of the States of the United States of America. As a matter of fact, today there is only one State in which the death penalty is mandatory, as it is in our country, and that is Vermont.

The PRESIDING CHAIRMAN: Mr. Dupuis?

By Mr. Dupuis:

Q. I have asked this question of other witnesses previously, but I wonder if Mr. Maloney would care to answer it or give his opinion on this matter. If the death penalty was to be maintained, would you favour, in order to

prevent an innocent person from being hanged, that a trial judge be compelled, without any other alternative, to render sentences as follows: (1) the death penalty, in the case of direct proof, and (2) life imprisonment, in the case of circumstantial proof?—A. Well, with my defence mind, I must frankly admit that I look for reasons to eliminate the use of the death penalty. I must frankly say, as a lawyer, however that I do not think such a distinction is advisable because we must recognize that there are many cases of circumstantial evidence that establish beyond peradventure the guilt of an accused person.

Q. I have one further question. Do you agree with what I say, that you do not get the real certitude under the best circumstantial proof, that you have in cases where there is direct proof? You are not forced to answer me. —A. No, I do not want to decline to answer any question if I can help the committee. There are cases in which the evidence is exclusively circumstantial which, in my opinion, are not such as to warrant a conviction, but there are also cases dependent solely on circumstantial evidence for proof that in my opinion have very great certitude.

Q. Would you say that in 100 per cent of cases you would have 100 per cent certitude of, what chall we vall it, a person guilty? You know what I mean.

The PRESIDING CHAIRMAN: What do you mean, 100 per cent?

Mr. DUPUIS: I am sorry I cannot explain myself so well as in my own language, but I will get myself understood in just a minute.

The PRESIDING CHAIRMAN: The law says beyond a reasonable doubt; is that what you mean to say?

Mr. DUPUIS: Yes, out of 100 cases, I wonder if the witness will admit this, that there is a chance that an innocent person would be condemned on account of having brought only circumstantial proof?

The WITNESS: Yes, I would concede that, but I do not confine my argument with reference to possible miscarriages of justice to cases that are based solely on circumstantial evidence. There are equal hazards in cases of direct evidence. A case where there is direct evidence given by a plausible witness who is perjuring himself, represents a dangerous hazard, I think. Miscarriages of justice do not solely occur in cases involving circumstantial evidence. That is what I meant to convey.

The PRESIDING CHAIRMAN: Now, Mr. Thatcher.

Mr. THATCHER: I wonder if Mr. Maloney would clarify the answer he made this morning. As a defence counsel what are the grounds on which you can appeal to the Supreme Court on behalf of a murderer?

The PRESIDING CHAIRMAN: You mean the Supreme Court of Canada.

By Mr. Thatcher:

Q. Yes, to the Supreme Court of Canada.—A. Well, under the present state of the law as amended in 1949, there is no right of appeal at all to the Supreme Court of Canada unless (a) at least one judge in the provincial appellate court has dissented on a question of law as opposed to or as distinct from a question of fact or a question of mixed law and fact; or (b) leave to appeal is granted by a single judge of the Supreme Court of Canada on a question of law whether or not there has been dissent on such question of law in the court of appeal. In other words, if you have a dissent on a question of law in a provincial appellate court, then you have an appeal to the Supreme Court of Canada on that question as of right. But if there is no dissent, then you only have a right to appeal to the Supreme Court of Canada if you first apply for and then obtain leave to appeal to that court, and such leave will not be granted unless you can establish that a question of law is involved

in the case. That does not include any question of law. There is no jurisprudence to establish what type of question of law will be sufficient to enable a judge to grant you leave. But a survey of the appeals in the last four or five years would seem to indicate that you will not be granted leave on a question of law unless you show that it is one of importance and that it is one which, if decided in favour of the appellant, would probably affect the outcome of his case.

Q. Am I right in assuming that very few murder cases can be appealed to the Supreme Court of Canada?—A. Yes, that is a correct assumption; but I should also point out that while it is extremely difficult to get leave to appeal to the Supreme Court of Canada in the ordinary criminal case, it is less but still very difficult to get leave to appeal in a murder case.

Mr. WINCH: That means that an appeal to the Supreme Court is directly an appeal on the basis of a question of law and not upon the guilt or the innocence of the prisoner. That is established within the province and there is no review of the evidence as to whether the man is guilty or innocent.

The WITNESS: Except in so far as it is necessary to review the evidence in order to consider the question of law involved. Let me illustrate my point with a case in which leave to appeal was granted. Consider the case of Kelsy versus the Queen in which leave to appeal was granted on a question of law although there had been no dissent in the Court of Appeal. One of the grounds for appeal was that the only evidence against the convicted murderer was based on his own confession—that there should have been no conviction without corroboration, or alternatively no conviction unless the jury had been warned about the danger of convicting in such a case with no evidence to corroborate the confession. That was a question of law and an important one which if decided in favour of the given appellant would have materially affected the outcome of his case. Accordingly it was a case in which leave to appeal was given.

Mr. THATCHER: Mr. Chairman, I admit that I am only a layman, but it seems to me there should be an inherent right in a man, even though convicted, to be able to appeal to the Supreme Court in every case. Is there some reason?

Mr. WINCH: That is only an appeal on a matter of law.

The PRESIDING CHAIRMAN: Or mistakes in the judge's charge to the jury, or misinterpreted evidence, not putting the defence properly to the jury, and so on that is to the Provincial Court of Appeal.

By Mr. Thatcher:

Q. Do you think, Mr. Maloney, that the grounds for appeal to the Supreme Court should be extended? Would you make such a recommendation to the committee?—A. My belief is that so long as the death penalty is retained in Canada there should be an automatic appeal to the Supreme Court of Canada in the case of every convicted murderer.

Q. I would agree with you wholeheartedly on that. It would seem to me that it might even be more sensible to have such an appeal to the Supreme Court of Canada rather than to the cabinet because I should think that the cabinet would be busy with other things and it might not give the attention to the appeal that it deserves.—A. But the Court and the Executive have quite different functions.

Hon. Mr. GARSON: Would you like to ask the witness whether it would be an appeal on law or upon both law and facts?

The WITNESS: You mean to the Supreme Court of Canada?

Hon. Mr. GARSON: Yes.

The WITNESS: Yes, it would apply to every convicted murderer.

The PRESIDING CHAIRMAN: You cannot appeal the verdict of a jury unless you change the law.

Mr. THATCHER: But it would be one additional safeguard, would it not?

Hon. Mr. GARSON: That is the reason I suggested that it be cleared up. Would you not agree that there is a question whether the verdict of a jury which is based on the facts should be subsequently upset by some court of appeal?

Mr. WINCH: Why is it that in capital cases, where the sentence of death is imposed, the appeal to the Supreme judicial body of Canada is only on a question of law and not on a question of fact?

The WITNESS: You are asking me that question?

Mr. WINCH: Yes.

The WITNESS: I think I know the reason. I do not subscribe to it, however.

By Mr. Thatcher:

Q. No?—A. The reason is that the Supreme Court of Canada, if it added to its present sphere of work the additional work that would be involved in requiring it to entertain appeals in the case of all convicted murderers, might feel that it was over-burdened.

Q. But life and death are the most important things of all, are they not?—A. That is the view I take, but it is justified—at least those who subscribe to that view justify it for this additional reason: They assume that the questions involved have been considered by the provincial appellate court, usually by at least five judges, and that what are issues of fact peculiar to the individual case should not have to be twice reviewed by an appellate court.

The PRESIDING CHAIRMAN: Now, Senator Hodges.

By Hon. Mrs. Hodges:

Q. Could I ask Mr. Maloney if he is prepared to go so far as to say that he thinks that every convicted murderer should automatically have an opportunity of appealing his case to the Supreme Court?—A. Yes.

Q. And would he go so far as to approve the suggestion that every murderer, even if acquitted, should have his case also automatically go to the Supreme Court?—A. No, Madame Senator, no. I take it you are not familiar with the present state of the law in so far as an appeal from an acquittal by the Crown is concerned.

Q. No.—A. Let me say briefly that the Crown has no right of appeal from an acquittal unless the Crown is able to satisfy the appellate court that an error in law was made at the trial. That would mean, in the case of a murder trial, where the jury had rendered a most perverse verdict of acquittal that the Crown could not succeed in appealing that acquittal unless it could show that the verdict was rendered by reason of some error in law, for example, error contained in the instruction as to the law given to the jury by the trial judge. Now, the reason why verdicts of acquittal are not as appealable as verdicts of guilty is traceable back to something very basic in our conception of law, that no one should be convicted whose guilt has not been proved beyond a reasonable doubt. Now, the reason for that, the wisdom for it, is that it is designed to prevent, if possible, the conviction of innocent persons, and for fear that a miscarriage of justice might occur in any given case and that an innocent person might be convicted, great rights are given to accused persons, including rights of appeal.

Hon. Mr. McDONALD: Is it not true that appeals to the Crown are always open, that is to the Department of Justice?

The PRESIDING CHAIRMAN: That is the prerogative of mercy.

Hon. Mr. McDONALD: What cases go to the Department of Justice?

The WITNESS: Every capital case is reviewed by the Department of Justice, whether application is made for a review or not. What that review involves is something that I understand you will be told at some later date in your deliberations.

Hon. Mr. McDONALD: But there is always an appeal?

The PRESIDING CHAIRMAN: It is an appeal in a different sense. It is not the same kind of legal procedure that is prescribed in a legal form. You go to the foot of the throne.

Hon. Mr. GARSON: The appeal that goes before the court is an appeal that has to do with the question of whether the accused is guilty or not guilty. The appeal that comes to the executive, after the accused has been found guilty and no further question can be raised concerning that point, is as to what type of punishment shall be imposed.

Hon. Mr. McDONALD: Mr. Chairman, I am not a lawyer, but would you allow me to disagree with the impression that the witness gave to the committee this morning, that the department is inclined to be rather too tough on these cases: I think the impression abroad is that the Justice Department is disposed to be or inclined to be very lenient—not very lenient, but we will say very fair in the reviewing of these cases.

The PRESDING CHAIRMAN: I think we will be able to draw our own conclusions after we get the presentation from the department as to their methods and the number of cases dealt with, etc.

Hon. Mr. McDONALD: Because of what was said this morning, I thought perhaps it would be unfair to give the impression that one gets—

The PRESIDING CHAIRMAN: I understood that the witness was expressing a view based on certain experiences which he had, and he thought that they indicated certain tendencies in that department when they were considering executive clemency. He is entitled to his view, whether we agree with it or not.

Hon. Mr. McDONALD: I think he indicated that he has been successful in one appeal.

The WITNESS: Two out of eight.

Mr. THATCHER: Mr. Chairman, just one point of clarification. I would like to find out whether or not the Supreme Court would be too busy to take automatic appeals on fact as well as on law. I wonder if the minister could tell us how many cases they would have had to deal with last year, for instance, if they had been doing this.

Hon. Mr. GARSON: I think that Mr. Maloney could tell you that at least as well as I could. We have nothing to do with these cases until they come to us for commutation of sentence.

The WITNESS: There are no statistics available now. Here are statistics however for the ten year period 1940 to 1949, in Canada: 450 persons were charged with murder. 177 of them had the sentence of death imposed upon them. 91 of the total 450 were actually executed. Now, that would mean in that ten year period the only ones who would have had occasion to appeal to the Supreme Court of Canada would be the 91.

Mr. THATCHER: That is 9·1 per year?

The WITNESS: Yes.

Mr. THATCHER: That would not appear to be much more onerous for the Supreme Court.

Hon. Mr. GARSON: Then, I think Mr. Maloney should also indicate that in the 91 would be included all the ones who actually did appeal other than the ones the verdict against which had been upset by the Supreme Court.

The WITNESS: As I would interpret those figures of 177 death sentences, they would...

The PRESIDING CHAIRMAN: Would all be appealable.

The WITNESS: Would all have been appealed to a provincial court. But these figures I have mentioned don't really help to answer your question. Accurate figures could be obtained.

By Mr. Thatcher:

Q. I have one final question. In your opinion do you feel that the Supreme Court would not be overburdened if these additional cases were given to them to decide.—A. I think that if that recommendation were implemented, it would be overworked unless their civil jurisdiction was limited further. That is, if you in effect reverse the order of things, and require that in civil cases you do not permit an appeal to the Supreme Court of Canada unless the amount involved exceeds a certain amount greater than the amount now prescribed, and unless leave is given. In that way their work in respect to civil matters would be lessened and there would be an increase in work involving capital cases.

By Mr. Boisvert:

Q. Mr. Maloney, this morning you mentioned the grand jury as a safeguard for an accused person, but from you comments I deduced that there is a doubt to the effectiveness of this safeguard. My question is this: would you consider the abolition of the grand jury as an improvement in the sense of reinforcing the right of full defence?—A. No. I do not say that the grand jury is no safeguard. All I suggest to the committee is that I believe it not to be such a safeguard as is often represented to committees of this nature. The only reason this morning I referred to the grand jury among other alleged safeguards was that when I read the debates in New Zealand and England, speakers in favour of retention invariably referred to these very important steps in criminal procedure as representing the inanswerable safeguards and as a result that none but the worst would be executed. I wanted to bring to your attention to what extent they are safeguards, and sometimes not safeguards at all. In the case of the grand jury it is not common, and on the other hand it is not rare, to see a grand jury return a verdict of no bill for murder and a true bill for manslaughter. In that case it represents a safeguard. But, I simply wanted to demonstrate to you its functions with a view to showing you that the grand jury in itself would not ordinarily represent much of a safeguard to an accused person because he is not there, his counsel is not there, and they conduct their deliberations under the guidance of Crown counsel. They only hear from certain witnesses, not necessarily all of the witnesses who will ultimately be giving evidence at the trial.

Q. One other question. In support of your opinion that the death penalty in Canada should be abolished and should be replaced by an indefinite period of imprisonment you gave as a strong point that it is according to our system of law possible that an innocent person may be convicted. For the same reasons as you gave in the field, as you said, of facts and law, judges and juries are caused by their human nature to make errors, is it possible that for the same reasons—same errors—some murderers were not convicted?—A. Some murderers were not convicted?

Q. Yes.—A. I unhesitatingly say that the rules of law that we have built up to avert, where possible, the conviction of innocent persons have, in their application, resulted in the acquittal of guilty persons on many, many occasions, but that would not warrant the slightest relaxation of the rules of law.

Mr. FAIREY: Would it not, following up what Senator Hodges said, point to a necessity for reviewing the evidence of persons who have been adjudged innocent, for fear that a guilty person has been wrongly acquitted?

The PRESIDING CHAIRMAN: They only get one chance.

Mr. FAIREY: I am thinking of this—and I do not disagree, mind you—I was thinking of the safeguards for the innocent person because the end is so final. After all, an innocent person presumably has been killed. We are not thinking too much about that at the moment, but suppose that murderer is able to obtain an acquittal in the court. Now, why can't the evidence of that case be reviewed in the same way as it is reviewed in the case of a conviction? You have explained it once, I know, but what I am trying to point out is this, you have just said that sometimes guilty persons are released?

Hon. Mrs. HODGES: Sometimes.

The WITNESS: Yes.

Mr. FAIREY: And yet, there is no review of the evidence to bring that person to justice?

The PRESIDING CHAIRMAN: That is extending the speculation quite a bit, is it not, Mr. Fairey.

Hon. Mrs. HODGES: Yes, but it is a logical conclusion. I was only dealing with the case Mr. Maloney suggested, that all murderers should automatically be able to appeal to the Supreme Court of Canada.

The PRESIDING CHAIRMAN: The criminal law and all procedures are outlined to deal with persons, first to determine guilt or innocence, and secondly, if there is a determination of guilt, there are procedures outlined for proceeding further to test such a determination, but if there is a determination of innocence, the Code is silent thereafter. However, we are considering capital punishment, corporal punishment and lotteries.

Mr. FAIREY: But it is a case of capital punishment.

Mr. WINCH: I would like to ask Mr. Maloney a couple of questions. It is an undisputable fact, from what we have heard this morning, that Mr. Maloney has made a very full study of homicidal cases and capital punishment, not only in this country but in other countries across the world. We have heard this morning of cold-blooded murder. I would ask Mr. Maloney if he has, from his study of homicidal cases in this country and other countries, reached any conclusion that the majority of homicides are not committed as cold-blooded murder, are not premeditated, are not decided upon at a time of calm reasoning, but follow through in a time of fear, escape, anger, passion and at a time when their mental capacities are not as they usually are?

The WITNESS: Yes, the study I have made of the cases referred to in the texts that I have read, indicates that the great majority of convicted murderers committed their crimes in circumstances that negative the existence of that so-called cold-blooded, premeditated state of mind. When you stop to think, in Canada today; what murder has ever been committed here that you would immediately say was cold-blooded premeditated murder?

Hon. Mrs. HODGES: What about the Guay case?

The WITNESS: I was just going to say that. I think that is the only one which would occur to you, and no other. That, to me, helps to demonstrate the rarety of this type of case.

Viscount Templewood has prepared some figures which might assist you in his book, "The Shadow of the Gallows". If you will just bear with me for half a minute, I will endeavour to find them for you. In his book, "The Shadow of the Gallows," at page 76, you will find a table in which he sets out as follows: between 1900 and 1948 in England the number of murders known to the police was 7,318. The number of cases in which the murderer or suspected murderer committed suicide was 1,635. The number of persons arrested was 4,077. The number found to be insane on arraignment was 412. The number found guilty but insane was 783. The number found innocent after conviction was 46. The number discharged or acquitted was 1,013.

Now, the conclusion arrived at from those figures is this: in other words, over that period from 1900 to 1948 the conclusion is that about 61 per cent of the known murderers were all of unsound mind. That figure, proves that the death penalty is no protection against a very large number of murders because, it is assumed it is no deterrent to persons of unsound mind. Persons of sound mind, whose crimes are committed in moments of passion, are not deterred by it because they did not pause or reflect, so the cases of cold-blooded murder are very rare indeed.

Hon. Mrs. HODGES: When you speak of cold-blooded murder, what do you call the case of a woman who administers poison in small doses over a long interval.

The WITNESS: I would define that as cold-blooded murder, the kind we are talking about.

Hon. Mr. GARSON: What would you say about a gang of robbers who arm themselves, go to a bank, break into it, and are prepared to shoot their way out, and actually do kill some persons? Would that be murder or an accident?

The WITNESS: I do not put them in that category. Admittedly, their primary purpose is a very unlawful one, but their main objective is to accomplish that purpose, if possible, without injury to the life of anyone.

Hon. Mr. GARSON: What do they take the firearms for?

Mr. WINCH: Intimidation.

The WITNESS: Intimidation, yes; or, I think we must admit a secondary purpose, defence of themselves. I see a world of difference between an accused murderer who commits a crime such as the honourable minister has just described, and the Guay case. I see a great distinction in degrees of guilt.

Hon. Mrs. HODGES: You still would not approve of capital punishment in the case of the Guay case?

The WITNESS: No, Madam Senator, I would not, because either it is right to abolish the death penalty or it is wrong, and we should not be influenced by isolated cases in reaching the decision we have to arrive at. And might I say this—the death penalty did not deter Guay.

By Mr. Winch:

Q. Am I right in the impression I got this morning from Mr. Maloney that at the preliminary hearing in Ontario, neither the accused nor his counsel is present?—A. No, at the grand jury proceedings.

Q. In other words, then, the Crown counsel directs the proceedings before the grand jury all the way through?—A. The grand jury?

Q. Yes?—A. The grand jury proceedings are under the guidance of Crown counsel only.

By Mr. Brown (Essex West):

Q. You have stated, Mr. Maloney, that the defence counsel would have no idea as to the backgrounds of the jury who are empanelled or called to an

assize. Can you tell us something about the facts? Does the Crown have access to all the backgrounds of the various jurymen?—A. To my knowledge, no, and I should have qualified that remark by saying in rural communities the individual counsel would, of course, have a greater knowledge of the background of the members of a jury panel than in an urban community.

Q. But would the Crown counsel have access to that information?—A. In rural communities?

Q. In any community?—A. I think the same principle would apply to a rural community, but I don't know what facilities Crown counsel have in urban communities for learning the background of the jury panel.

The PRESIDING CHAIRMAN: I promised Mr. Thatcher that he could ask questions now.

By Mr. Thatcher:

Q. I have one short question, Mr. Chairman. Mr. Maloney stated that from 1940 to 1949 there were 177 death sentences, I believe, in Canada. I would like to know specifically how many were able to appeal their sentences to the Supreme Court? If you cannot give that information now, you could provide it later perhaps?—A. I would be glad to. I cannot give you that figure now.

The PRESIDING CHAIRMAN: Senator McDonald?

By Hon. Mr. McDonald:

Q. I was just going to follow up on the jury question. It works out in the rural districts that the jurymen are pretty well hand-picked—they are pretty well screened and known by both Crown and defence counsel. I suppose in the larger cities, like Toronto and Montreal, it is different?

The PRESIDING CHAIRMAN: Oh, yes. Now, Mr. Shaw?

By Mr. Shaw:

Q. I was going to ask the witness if he would care to comment on the present procedure in ascertaining the mental condition of a man charged with murder. It may not be a fair question. I do not know what you may know from the standpoint of a defence lawyer but are you satisfied? Have you any comments to make or recommendations to make on the basis of the present procedure? As a layman, I might say that sometimes I become greatly upset as a consequence of conflicting opinions of psychiatrists. You may get some men pretty well qualified, some who are called by the Crown and some who are called by the Defence and they clash just like that. Have you any opinion? —A. I am confining my comments to the problems of minds which arise in relation to the trial of the accused, not to procedures which take place after his conviction, or matters of that nature. But I too am struck just as you are with the number of cases where insanity is raised as a defence, wherein psychiatrists of repute in the employ of the Crown are called by the Crown and invariably testify as to the accused man's sanity.

But mind you, there are cases in which they testify to the contrary too. There are many cases in which they testify that the accused is sane. Psychiatrists of great repute, whose veracity I do not think you would have any reason to question, testify to the contrary for the defence. Now, I do not know what the reason is except that I think it shows that a state of doubt exists in the minds of two sets of experts. It seems to me that in such a case where reputable psychiatrists for the defence, whose veracity we do not question, express a considered opinion that the accused is insane, that certainly the convicted person should not be executed.

The PRESIDING CHAIRMAN: Mr. Brown.

By Mr. Brown (Brantford):

Q. I was going to ask whether the witness could give us any information as to what states or jurisdictions reserve the death penalty for persons convicted of a subsequent offense of murder?—A. It is referred to in the appendices to the report of the Royal Commission. Might I find it for you after the meeting.

Q. Yes, just so long as it is there, I am satisfied. Now I take it that you regard the chief and over-all objection to the death penalty to be that it is not a deterrent. Is that your chief objection to the death penalty?—A. My chief objection to the death penalty is that in my opinion it is not the only effective deterrent, and that being a drastic form of punishment it should not be resorted to. An examination, as I indicated earlier, of the experiments by other jurisdictions with abolition, in my opinion, establishes that it is not the only effective deterrent.

The PRESIDING CHAIRMAN: Mr. Fairey.

By Mr. Fairey:

Q. Was there not a suggestion in what you said that normally psychiatrists when called for the Crown tend to testify as to the sanity of the accused, whereas psychiatrists when called for the defence more often than not testify that he is insane?—A. Of course a psychiatrist would not be called for the defence who was to testify that the accused was sane in a case where a defence of insanity was being relied upon.

Q. Then there is no reliability in the evidence of psychiatrists?—A. I do not mean to imply that there are no cases in which psychiatrists in the employ of the Crown do not concur or agree in the suggestions of the defence that the accused was insane. There are many such cases; but there are also many cases in which there are conflicting points of view expressed by the experts. I do not say they are valueless at all. I think that where you find experts of equal authority in conflict as to their conclusions in regard to a particular offender that it should raise sufficient doubt, certainly in the mind of the Minister when he comes to consider the question of executive clemency.

The PRESIDING CHAIRMAN: I do not think the witness intended to be critical of psychiatrists and opinions of that type. All he says is that if you do get psychiatrists called for the Crown asserting the sanity of the accused, while psychiatrists called for the defence testify as to his insanity, then under those circumstances if the accused should be convicted, that he should not be hanged, because of the uncertainty. That is all.

The WITNESS: Yes, that is all I intended to convey.

The PRESIDING CHAIRMAN: Mr. Cameron.

By Mr. Cameron:

Q. Now that we have our prisoner without any hope, and he has exhausted all his legal rights and is awaiting execution, he has, as I understood you to say the right to seek executive clemency. I think you said there were two avenues of approach, one leading to the Queen and the other to the executive. Would you mind explaining what you meant by that?—A. I do not recall having expressed myself in that way. The only procedure under our law open to an accused person in Canada is through the Governor in Council who, after reviewing the case and upon appropriate recommendation from the officials who have investigated it, will or will not grant executive clemency.

Q. There is only the one avenue of approach then. He cannot approach the Queen directly. That has caused me some confusion because I thought I heard it suggested that there were two avenues of approach.—A. Whether Her Majesty, the Queen would have a special prerogative which she could exercise, I do not know.

Hon. Mr. GARSON: I think that probably stems from the provision in the Criminal Code to the effect that nothing herein contained shall be deemed to affect the royal prerogative of mercy.

Mr. CAMERON: The right is still there.

Mr. WINCH: I asked you that question on the floor of the Commons, and you said that although it was there it was never exercised.

Hon. Mr. GARSON: The Queen exercises her right of royal prerogative as a constitutional monarch.

By Mr. Cameron:

Q. You suggested that after the jury had recorded its verdict it should be charged with a subsequent duty of considering whether it should recommend mercy or not. Is that going to conserve the equality? One person has a very eloquent counsel who has a tremendous effect on the jury, and another one may be a very brilliant lawyer but unable to draw on the emotions and sympathies of the jury and may be unable to present such a striking argument on behalf of the accused. What I have in the back of my mind is that that is something that should probably be left to other agencies to determine, whether clemency should be exercised or not, rather than leave it to the jury, who might be inclined, now that they have found the man guilty, to say that mercy.—A. The inequality you seem to be apprehensive about exists in other phases of the accused man's case not just in that particular phase you are directing attention to. The only reason I raised that for consideration by the committee is that I wondered if in its consideration of applications for clemency the Department of Justice drew any inferences from the failure of a jury in any given case to make a recommendation of mercy. Now, if that is so, it would be unfortunate because, as I pointed out, juries are not told about their right, and I am satisfied from personal experience that some juries do not know of their right.

Q. I understood you to suggest that once the trial itself was over the jury should then be asked by the judge to consider whether they should or should not make such a recommendation. Undoubtedly then the counsel for the Crown and the counsel for the accused and the judge would all enter into that discussion, and the jury would then retire and come to a decision on it, and suppose they were not unanimous?—A. As I indicated in my presentation, I advocate, first of all, abolition; secondly, as an alternative, I advocate that you implement the recommendation of the royal commission in England, which recommends that the discretion be passed to the jury to determine whether or not life imprisonment should be imposed; and as a third possibility, I invited the committee to consider whether or not they should recommend that the juries be told of their right to recommend mercy. My reason for suggesting that you consider that, if you do not recommend abolition or if you do not make the other recommendation, is for fear that the department might draw an unfavorable inference from a jury's failure to recommend mercy.

Q. I was just wondering about the practical working out of such a plan.—A. The difficulties you are apprehensive about would exist even if you carried out the second recommendation.

Q. And when you were dealing with the question of clemency, you suggested that no person should be hanged where a competent psychiatrist certified as to whether or not there was some doubt as to his sanity. The thought occurred to me that that would pose this question for defence counsel. He says, "If I can secure some competent psychiatrist who says that it is doubtful whether my man is sane, he can safely go through all the trials and tribulations of a trial, and then when I get down to the minister I will just produce this certificate and the sentence will be com-

muted." Would it not be better to have an independent panel if that consideration were given to the proposal, selected by the Minister of Justice to advise him so that he could rely on their opinion rather than on the opinion of a psychiatrist retained by the accused?

The PRESIDING CHAIRMAN: I am sure that if there were a difference of opinion, the minister would resolve it by getting an independent opinion.

Hon. Mr. GARSON: Yes.

By Mr. Cameron:

Q. I thought you meant that if a psychiatrist said that, ultimately the sentence should be commuted?—A. I do not retract from what I said. I do not think you should be dissuaded from accepting my view on the speculative assumption that a psychiatrist might improperly give a helpful report after having been improperly asked to do so by an unethical counsel.

Q. If he is one who is prepared to swear under Oath those facts, then you know as far as the accused is concerned he is not going to be hanged.—A. If there is reason to doubt the integrity of the psychiatrist or the counsel who requests him to perform his function very little weight if any would be attached to his recommendation. That is not the type of psychiatrist I had in mind.

Q. I am speaking of an independent panel rather than someone retained either by the Crown or the accused.—A. You mean a permanent panel in the employ of the Crown?

Q. Not necessarily, but an impartial panel drawn for that purpose to advise the minister in performing his duties. Psychiatrists generally across Canada.—A. I do not think anyone could quarrel with that.

By Mr. Winch:

Q. If the proposal that is in the British report were put into effect of referring a question of clemency or otherwise back to a jury, would you then take the position that if the jury recommended leniency it would be mandatory on the judge to impose a life sentence and not capital punishment?—A. You are asking me if that would be the effect of carrying out the recommendation contained in the English report?

Q. If that would be your idea of it?—A. That would be the effect of implementing the recommendation in the English report.

The PRESIDING CHAIRMAN: Before we adjourn I would like to express on behalf of myself and the members of the committee our appreciation for your presentation, Mr. Maloney.

Mr. BROWN (*Essex West*): Should there be a direction that the books in the bibliography, if not in the library, should be obtained by the library?

The PRESIDING CHAIRMAN: Is the committee agreeable to that suggestion? Agreed.

The PRESIDING CHAIRMAN: We have the direction of the committee now. The next meeting is on Thursday at 4.00 p.m. Mr. Wismer will be here.

APPENDIX A

CAPITAL AND CORPORAL PUNISHMENT

A list of books and some recent articles available in the Library of Parliament, March 15, 1954.

Annals of the American Academy of Political and Social Science. "Murder and the death penalty." November issue, 1952. (Articles offering factual information on the death penalty as a reterrent.) 166 p.

Arnold, J. C. "Murder and capital punishment." in, *The Quarterly Review,* April 1952, p. 238-51. (Summary of evidence presented to the Royal Commission).

Aschaffenburg, Gustav. "Crime and its repression." translated by A. Albrecht. Boston, Little, Brown, 1913. 331 p. (Room 25).

Banks, William. "Canada's effective criminal law system." in, *Current History,* vol. 28, 1928, p. 405-07.

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Note.—Les documents officiels du gouvernement canadien mentionnés dans la liste d'ouvrages anglais sont aussi disponibles en français.

APPENDIX B

(A Committee of the Religious Society of Friends (Quakers) in Canada)

DECEMBER 22, 1953.

To the Members of the House of Commons,
Ottawa, Canada.

Dear Member:

We are taking the liberty of sending to you herewith

(a) a statement issued by London Yearly Meeting of the Religious Society of Friends, Quakers, and concurred in by Canada Yearly Meeting of Friends, on the subject of *Capital Punishment.*

(b) a brief sent to the Canadian House of Commons Committee on the revision of the penal code by the Canadian Friends' Service Committee dated February, 1953.

We are sending these documents to you because of the widespread interest at the present time in this subject.

We should like to call attention to a misconception which has been given wide publicity in the press concerning a period in 1948, during which executions for murder were suspended in Great Britain. This suspension has been referred to as abolition, and it has been stated that due to a large increase in capital crime the British Government was forced to reinstate the death penalty. According to our information this period of suspension took place following a vote in the House of Commons in April 1948 in favour of a trial period, during which capital punishment could be held in abeyance. In November 1948 the House of Lords voted overwhelmingly against suspension, and capital punishment was resumed.

If this period from April to November is thought of as the truce, the following figures published in *Hansard* 27th January 1949, as given by the Home Secretary, will be of interest:

19 murders in 7 weeks before the truce.
25 murders in first 7 weeks of the truce.
17 murders in last 7 weeks of the truce.
26 murders in the 6 weeks following the resumption of executions.

It should be stated that this very short period is recognized as not being sufficient to determine a definite trend. It does, however, dispose of the widespread view that the resumption of hanging was due to a large increase in capital crime.

We trust that this information and the view expressed by the Religious Society of Friends as to the principles involved will have their due place in the further discussions on this subject.

Yours sincerely,

FRED HASLAM,
General Secretary.

Extract from the Second Part of the Christian Discipline of the Religious Society of Friends in Great Britain (approved by Canada Yearly Meeting).

Capital Punishment

"We have often expressed our *objection to capital punishment.* We re-affirm our belief in the immeasurable value of every human life, and the infinite possibilities of spiritual reclamation. We regard the law of God for the individual as binding upon the community, and we cannot rest satisfied whilst what is wrong for a single person is practised by the State. Moreover we believe that capital punishment fails as a deterrent. The sight of an individual fighting for his life adds an exceptional and dramatic interest to murder trials. There is a consequent inducement to give them wide publicity, which tends to make the thought of murder familiar, and to morbid minds even attractive.

We remember also the suffering which the capital sentence may inflict on the relatives of the person sentenced, and its effects upon others whom circumstances connect with such cases; upon the jury, the judge, the prison officers, and all who are connected with the execution.

We believe that a considerate and Christian treatment of the offender is as possible in cases of murder as in the case of other crimes, and we urge Friends to do all in their power to create a public opinion which will demand the complete abolition of the death penalty.—1925".

CANADIAN FRIENDS' SERVICE COMMITTEE (QUAKERS)

60 Lowther Avenue,
Toronto.

17th February, 1953.

To—
The House of Commons' Committee on the Revision of the Criminal Code,
c/o Ministry of Justice,
Ottawa, Ont.

Dear Sirs,

The Canadian Friends' Service Committee is a committee appointed by the Religious Society of Friends (Quakers) in Canada and is the Committee responsible for considering matters pertaining to human welfare.

It is the understanding of the Canadian Friends' Service Committee

(1) that the provisions of the Canadian Criminal Code are now under revision and that the proposed revisions will be further considered by your Committee;

(2) that in the proposed revisions, capital punishment for the crime of murder is retained. It is on this point that our Committee would like to present a brief.

The subject of crime and punishment has always engaged the attention of the Society of Friends and individual members have taken part in reform movements, more particularly in Great Britain. It is because of this background that we desire to submit to your Committee the following reasons for our belief that capital punishment should no longer be retained on the statutes of Canada:

(1) *The value of human life.* Human life, created by God, is of inestimable importance. Its value would be more generally recognized if the State would no longer take away human life in the name of the law.

(2) *Provision* for reformation. Because of its irrevocable character capital punishment denies the Christian virtue of mercy and precludes the possibility of the offender being influenced by reformative measures.

(3) *Human judgment is not infallible.* It is our belief that justice in Canada is administered under a very high sense of obligation and integrity. Nevertheless, it is possible for mistakes of judgment to be made and in cases for which the penalty is death, such mistakes cannot be rectified. It may be added that the hearing before the Select Committee of the British House of Commons in 1929 revealed cases both in Europe and in the United States of America in which innocent people had been executed. The following are examples:

In Germany, Jakenbowski, executed in 1926, was posthumously exonerated in 1929 (*Times*, June 18, 1929), and Paul Dujardin, sentenced to life imprisonment for murder in 1919, was proved innocent in 1929, released and compensated (*Daily Mail*, May 20th, 1929). In Hungary, Stephen Tomka was hanged in 1913 and discovered to be innocent in 1927 (*Times*, December 8th, 1927).

In England also there are doubts about the guilt of Mrs. Thompson (1923), Thorne, (1924), Podmore, (1930), Rouse (1931) and others.

(4) *Deterrence.* While it is conceded that the fear of death may act as a deterrent to people in normal life, homicide is usually committed by people who are (*a*) under the influence of passion, anger or drink, in which case it is questionable whether the assailant gives serious thought to future consequences; and (*b*) by people acting in a calculated manner but in which possibility of escaping detection is also calculated. In both categories, capital punishment fails as a deterrent. In further support of this view regarding the efficacy of capital punishment as a deterrent, are the attached statistics with regard to the experience of other countries.

(5) *Other persons involved.* The execution can do nothing to bring back the life already taken. The period of trial is extremely trying to the relatives and friends of the victim. Nevertheless, as a matter of record, there have been many cases in which they have been among the first to ask that a second life should not be taken. For the relatives and friends of the accused, the pre-execution period is a nightmare of unwanted publicity and mental anguish. The effect of an execution on the personnel and inmates of the prison where it takes place, is often serious. Prison officials are known to have committed suicide due to the strain imposed by execution proceedings.

(6) *History of the accused.* It would seem that more extensive investigation should be made into the history of the accused person in order to discover if possible, the reasons which lead to the crime. It has been shown that temporary mental disturbances often cause violent actions.

(7) *Responsibility of Society.* Mention should be made of the element of violence in so-called educational media. The toy gun of childhood is later followed by crime fiction and the violent film. There is a continuing traffic in lethal weapons. Some attempt should be made to assess the influence of these factors and the state should accept its rightful share of responsibility for violent actions resulting therefrom.

Yours sincerely,

Signed. FRED HASLAM,
General Secretary.

ABOLITIONIST COUNTRIES

The following states have either abolished capital punishment by law for the civil crime of murder or allowed it to fall into abeyance by a policy of reprieve:—

Austria
Finally abolished June 1950.

Belgium
Abrogated by disuse. Last execution 1863, except for one case during the 1914-18 war.

Denmark
Abolished 1930. No execution since 1892.

Finland
Abolished 1949. No execution since 1826 except during the revolution of 1918.

Western Germany
Abolished 1949.

Holland
Abolished 1870. No execution since 1860.

Iceland
Abolished on establishment of Republic 1944.

Israel
Abolished 1952.

Italy
Finally abolished 1948.

Luxembourg
Abrogated by disuse. No execution since 1822.

Norway
Abolished 1905. No execution since 1876.

Portugal
Abolished 1867.

Roumania
Abolished 1864. No execution since 1838.
Restored for political crimes 1938.

Sweden
Abolished 1921. No execution since 1919.

Switzerland

Abolished 1942. No execution since 1924.

United States of America

Abolished in Michigan (1847), Wisconsin (1853), Maine (1887), Minnesota (1911), Rhode Island (1852) and North Dakota (1895). In the last two states there is abolition except for murder in the first degree committed while serving sentence for murder in the first degree.

In 35 of the remaining 42 states, there is power to pronounce an alternative sentence of life imprisonment. Ten states having abolished capital punishment, restored it, seven of them after a very short period.

Tennessee	Abolished	1915	Restored	1919
Arizona	"	1917	"	1919
Missouri	"	1917	"	1919
Colorado	"	1897	"	1901
Iowa	"	1892	"	1898
Washington	"	1913	"	1919
Oregon	"	1914	"	1920
South Dakota	"	1915	"	1939
Kansas	"	1907	"	1935

Central and South America

Argentine	Abolished 1922.
Brazil	" 1891.
Columbia	" 1910.
Costa Rica	" 1880.
Dominica	" 1924.
Ecuador	" 1897.
Honduras	not included in Constitution of 1894.
Mexico	Abolished 1928.
Panama	" 1903.
Peru	Discontinued for about 50 years. Reintroduced for political crimes 1949.
Uruguay	Abolished 1907.
Venezuela	" 1863.

Australia

Queensland — Abolished 1922. No execution since 1913.

India

Nepal — Suspended for 5 years in 1931. Not reintroduced.